

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1443

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

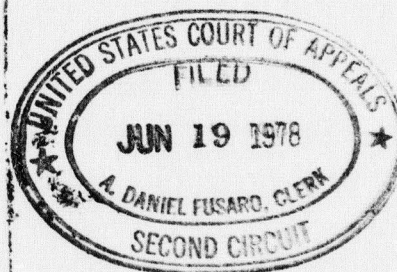
----- x
UNITED STATES OF AMERICA, :
 :
Appellee, :
 :
-against- :
 :
DENNIS BENNETT, :
 :
Defendant-Appellant. :
----- x

Docket No. 77-1443

Docket No. 78-T8792

=====
APPENDIX FOR DENNIS BENNETT
=====

B
P/S



Richard E. Rieder, Esq.
Attorney for Appellant
DENNIS BENNETT
161 East 42nd Street
New York, NY 10017
(212) 682-8811

PAGINATION AS IN ORIGINAL COPY

APPENDIX

	<u>Page</u>
Court Docket Sheet	1-3
Indictment	4-5
Affidavit of Rigdon H. Boykin	6-8
Affidavit of Linda Bennett	9-10
Affidavit of Carolyn Usher	11-12
Charge to the Jury	13-47
Judgment	48
Memorandum of Decision and Order dated 4/17/78	49-57
Government Exhibit 25	58-61
Government Exhibit 26	62-66
Transcript References	67-120

U.S. TITLE SECTION: 21:841(a)(1) & 846 18: 2

OFFENSES CHARGED: Did conspire to distribute and to possess with intent to distribute a quantity of heroin

2

RECEIVED

SUPERSEDED COUNTS

U.S. MAG. CASE NO. 77-201-702

BA: 77-201-702

AM: Fugitive

Denied: Ser: Pers. Recor: PSA

\$150,000

Date: 8/3/77

Bail Not Made: Collateral: 3rd Cust Other

Status Changed (See Docket):

II. KEY DATES & INTERVALS

ARREST or U.S. Custody began: 3-28-77

INDICTMENT X Information: 4-7-77

ARRAIGNMENT 4/13/77

TRIAL 7/11/77

8/1/77

8/13/77

SENTENCE

Disposition: 8/3/77

On All Charges: 8/10/77

On Lesser Offenses: 8/10/77

Dismissed: NOP: WF

On Government Motion

MAGISTRATE

DATE: 3-28-77

INITIAL/NO.: ACC/07AE

INITIAL APPEARANCE DATE: 4-7-77

PRELIMINARY EXAMINATION OR REMOVAL: 4-7-77

OUTCOME: HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

ASC 07AE

Conspire to distribute and possess with intent to distribute heroin T-21 USC Sections 841(a)(1) and 846.

U.S. Attorney or Asst. Richard A. Appleby

ATTORNEYS: Gilbert Flowers, Esq. 225 Broadway, NYC 964-4531

140 West 72nd Street New York, NY 873-7297.

DATE	DOCUMENT	PROCEEDINGS	EXCLUDED DELAY
4-7-77	Before CHREIN, J.	Indictment filed.	
4-13-77	Before Mishler, Ch J	case called - deft & counsel present - deft arraigned and enters a plea of not guilty - bail conditions contd - May 6, 1977 to set a trial date.	4/13/77IT 5/6/77
4-14-77	Notice of appearance filed.		
5.6.77	Before Mishler, J.-	Case Called. Deft. present. Counsel not present. Case adjd. to 5.20.77 to set trial date.	5/7/77IT 5/20/77
5/20/77	Before Mishler, Ch J	case called-deft & counsel present court relieved counsel on his motion-court to appoint Legal Aid 6/3/77 for status report. jlj	5/21/77IT
6/3/77	Before Mishler, Ch J	case called-deft & counsel present 7/1/77 for trial. jlj	6/3/77IT & T
7/11/77	Before Mishler, Ch J	case called-deft & counsel present- 8/1/77 for trial. jlj	7/11/77
8-1-77	Before Mishler, Ch J	case called - deft & counsel Chris Termini present - trial ordered and begun - Jurors selected and sworn - Trial contd to 8-2-77.	

DATE	IV. PROCEEDINGS (continued)	AGE TWO	V. EXCusable DELAY			
	(DOCUMENT NO.)		Start Date (a)	Start Date (b)	Ltr. Code (c)	Total Days (d)
8/2/77	Before Mishler, Ch J-case called-deft & counsel present-govt rests-deft moves to dismiss count 2 of the indictment motion denied-motion to dismiss both counts as being based on a theory of entrapment denied-defense rests-deft renews motions to dismiss both counts motion denied-summation by govt-summation by defts-rebuttal summation by govt-the court charges the jury-jury to return 8/3/77 for deliberation-trial contd to 8/3/77.jlj					
8/3/77	Before Mishler, Ch J-case called-deft & counsel present trial resumed-jury retires for deliberation at 10:05 am-jury returns at 10:20 & 11:30am to listen to tapes jury returns at 1pm and renders a verdict of guilty on both counts 1 and 2-jury excused trial concluded-bail set at \$100,000.00 surety bond cash.jlj					
8/3/77	By Mishler, Ch J-Order of sustenance filed.jlj					
8/3/77	By Mishler, Ch J Order xxx filed that Caroline Usher may be called to testify or provide other information before a petit jury at the trial etc.jlj					
8-18-77	Voucher for expert services filed and forwarded for payment.					
8-25-77	Transcripts filed dated Aug. 3, Aug 1 and Aug. 2 respectively (pages 1 to 303)					
8-26-77	Information filed re this indictment which was filed 4-7-77 (inserted in criminal file).					
9-30-77	Before Mishler, Ch J - case called - deft & counsel Chris Termini present. On motion of AUSA Soroks the second felony information is dismissed. Deft sentenced to imprisonment on counts 1 and 2 for a period of 10 yrs and special parole term of 20 yrs to run concurrently with each other. Special condition of parole is that if the deft is deported he is not to re-enter the US, its territories or possessions during his special parole period. Clerk to file Notice of appeal without fee.					
9-30-77	Judgment & commitment filed - certified copies to Marshal.					
9-30-77	Notice of appeal filed - docket entries and duplicate of notice mailed to the court of appeals					
10-4-77	Judgment & commitment returned and filed - deft deft delivered to M.C.C., N.Y.					
10-12-77	Notice of motion for relief pending review filed. mg					
11-1-77	By Mishler, Ch. J. - Order retaining deft at M.C.C., N.Y. to and including 11-11-77 filed. Copy mailed to Warden Taylor, M.C.C., N.Y.					
11-1-77	Letter from Michael H. Soroka, A.U.S.A. to Judge Mishler dated 10-13-77 filed.					
11-9-77	Letter filed recvd from Chambers from atty for the deft Phyllis Sklooc Bamberger.					
11-9-77	By Mishler, Ch J - Order filed that the deft be retained at the MCC to and including Nov. 30, 1977.					

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

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DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
11-14-77	Scheduling order filed that the record on appeal be docketed on or before November 17, 1977.				
11-17-77	Record on appeal certified and handed to Katherine Kass for delivery to the court of appeals (office of Richard Rieder, Esq. apptd by c of a on appeal 77-1443 relates)				
11-21-77	Acknowledgment filed received from the court of appeals for receipt of record on appeal.				
11-21-77	Copy of letter from Judge Mishler to Warden Lawrence Taylor, M.C.C. and of order filed, re: retention of debt at M.C.C. until 11-11-77. sk				
12-19-77	Deft's petition in support of a request pursuant to 18:2255 for an order vacating sentence filed, with an affidavit and a memorandum of law in support of petition - forwarded to chambers with Civil and Criminal files and copies of sk docket entries.				
12-21-77	Deft's Affidavit of Service filed, for service of an order to show cause, the affidavit of Rigdon H. Boykin, and the memorandum of law in support of the petition of Dennis Bennett at the Office of the U.S. Atty. sk				
1-12-78	Govts Memo randum filed in opposition to defts petition pursuant to 28:2255 to vacate judgment.				
2-21-78	Reply Memorandum filed on behalf of debt by counsel for the debt Richard Rieder, Esq.				
3-16-78	Transcript filed dated 8-1-77. rs				
4-18-78	By Mishler, Ch. J. - Memorandum of Decision and Order dated 4-17-78 filed, denying debt's motion for vacation of conviction pursuant to 28:2255. SK				
4-18-78	Judgment dated 4-18-78 filed, that the petitioner take nothing of the respondent, and that the petition is dismissed. (77 C 2493 relating). sk				
5-15-78	Notice of Appeal filed and forwarded to Court of Appeals with copy of docket entries (dismissal of 28:2255 petition - 77 C 2493 relating). sk				
5-25-78	Supplemental/ Record on appeal certified and handed to Frank Zucker for transmittal to Court of Appeals, with certified copy of docket entries. sk				

MAILED May 25 1978
RICHARD H. WEARE
CLERK

TRP:GWS:sm
F. #771,411

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

DENNIS BENNETT,

Defendant.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

From in or about December, 1976 to in or about March, 1977, within the Eastern District of New York and elsewhere, the defendant DENNIS BENNETT, together with Francisco Estrada-Ponce, named herein as a co-conspirator but not as a defendant, and others known and unknown to the Grand Jury, did knowingly and intentionally conspire to distribute and possess with intent to distribute quantities of heroin hydrochloride and cocaine, Schedule I and II narcotic drug controlled substances, in violation of Title 21, United States Code, Section 841(a)(1). (Title 21, United States Code, Section 846).

COUNT TWO

On or about March 26, 1977, within the Eastern District of New York and elsewhere the defendant DENNIS BENNETT and Francisco Estrada-Ponce, named herein as a co-actor but not as a defendant, did knowingly and intentionally possess with intent to distribute a quantity of

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ APR 2 1977 ★

TIME A.M.
P.M.

I N D I C T M E N T

Cr. No.
(T. 21, U.S.C., §§841(a)(1)
and 846, T. 18, U.S.C., §2)

77CR 201

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heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1), Title 18, United States Code, Section 2).

A TRUE BILL.

Therese P. Long
FOREMAN

David G. Trager
DAVID G. TRAGER
United States Attorney
Eastern District of New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

12/19/77
hand
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-----x
UNITED STATES OF AMERICA, : Index No.: 77-CR-201
-against- :
DENNIS BENNETT, : AFFIDAVIT
Defendant. :
-----x

RIGDON H. BOYKIN, being duly sworn, deposes and says:

1. I am associated with Richard E. Rieder, attorney of record for the petitioner and am fully familiar with the matters stated herein. I make this affidavit in support of petitioner's request for an order vacating the judgment of conviction entered on September 30, 1977 pursuant to 28 U.S.C. §2255.

2. The petitioner herein, Dennis Bennett ("Den"), has informed me that prior to trial he specifically told his trial counsel, Chris Termini, certain facts concerning a loan and a pledge of jewelry.

3. Those facts are as follows:

a. Dennis met Francisco Estrada-Ponce ("Francisco") in December of 1976 through a mutual friend in Los Angeles, California.

b. Dennis negotiated a loan from Francisco in the amount of \$2,700.

c. As security for the loan Dennis gave Francisco, a ruby and diamond dinner ring and a large gold medallion to hold as a pledge.

d. When Dennis learned from Carol on March 26, 1977 that Francisco was in New York with his merchandise, Dennis believed that Francisco had brought

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back the jewelry he had given as a pledge.

4. In addition, the petitioner informed me that he told an unidentified person from Legal Aid about this loan/jewelry pledge transaction.

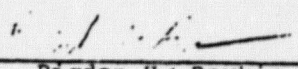
5. That interview is reflected in a memorandum contained in the Legal Aid file of the petitioner written by Edward J. Kelley, Associate Attorney In Charge, Federal Defender Service Unit, Criminal Defense Division, Legal Aid Society. This portion of the memorandum states as follows: "D denies. Says he knew Estrada (see cplt unindicted co conspirator) from California. D borrowed some \$ from Estrada and gave Estrada jewelry to hold as collateral."

6. Upon receiving this information, I called Chris Termini, a representative of the Legal Aid Society, which had been counsel for the petitioner. I asked Mr. Termini about the loan/jewelry pledge transaction and he stated to me that he did not recall any facts concerning a loan or a pledge of jewelry. He further stated that he may have learned of such facts but did not realize the significance of them at trial. He just does not recall at this point in time.

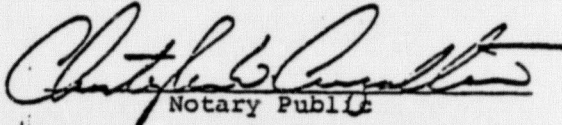
7. The judgment of conviction of the petitioner is presently on appeal in the Court of Appeals for the Second Circuit. Briefs have not been filed as of this point in time and the petitioner is concurrently, with the filing of this petition, moving for a stay of the proceedings in the Court of Appeals pending a decision with respect to this petition.

8. As the transcript of the trial is currently in the record in the Court of Appeals, I have xeroxed a copy of the

original and am filing it with this affidavit.


Rigdon H. Boykin

Sworn to before me this
16th day of December, 1977.


Notary Public

CHRISTOPHER W. CONGALTON
Notary Public, State of New York
No. 60-5778990
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, : Index No.: 77-CR-201
-against- :
DENNIS BENNETT, : AFFIDAVIT
Defendant. :
-----x

LINDA BENNETT, being duly sworn, deposes and says:

1. I am the wife of the petitioner herein, Dennis Bennett ("Dennis"), and make this affidavit in support of his motion to vacate the judgment entered by the United States District Court for the Eastern District of New York on September 30, 1977 in the above-captioned proceeding.
2. In November of 1976, I was living and working in Los Angeles, California. At that time my husband Dennis was in New York City attempting to sell a house which we had purchased on August 21, 1972 from Carver Federal Bank.
3. Dennis was attempting to sell this house to the man who was presently living in it and making the mortgage payments for us.
4. During the course of these negotiations it became apparent that the matter was going to cause some litigation and that I would be needed to testify since I originally negotiated the transaction with the buyer's representative.
5. As neither Dennis nor I had the money for me to move to New York, Dennis asked me in December 1976 to give him a dinner ring which we had purchased in 1971 at a jewelry store down on Canal Street.

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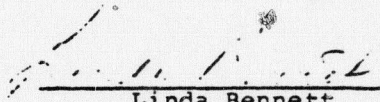
6. To the best of my recollection, this ring was purchased for approximately \$800.00. The ring was white gold and had rubies in the center of it in the form of a poinsettia with diamonds around it.

7. At the time, Dennis and I had very heated discussions about the propriety of borrowing money using my ring as a pledge, however, he finally persuaded me to let him have the ring.

8. Dennis was also going to pledge an 18 carat gold medallion which was approximately 2 1/2" in diameter on which was depicted the symbol of Virgo from the Zodiac. In addition, there were approximately ten diamonds set on the medallion. This medallion belonged to Dennis and is one of a pair which we gave to each other on our wedding anniversary. To the best of my recollection the year was 1973.

9. Later that day, Francisco Estrada-Ponce ("Francisco") came to the house. I left the room because I was still upset with my husband for taking my ring. When Francisco left, my husband informed me that he had been able to get a loan from Francisco of \$2,700.00 by using the ring and medallion as a pledge.

10. We used this money to rent a Ryder truck to transport my furniture, etc. back to New York and rent an apartment where we intended to stay until we got the matter of the house cleared up.


Linda Bennett

Sworn to before me this
9th day of December, 1977.

Notary Public

THOMAS H. SCHMIDT
Notary Public, State of New York
My Comm. Expires March 20, 1980
I am Notary Public for the County of _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, : Index No.: 77-CR-201
-against- :
DENNIS BENNETT, : AFFIDAVIT
Defendant. :
-----x

CAROLYN USHER, being duly sworn, deposes and says:

1. I make this affidavit in support of the motion of Dennis Bennett ("Dennis") to vacate the judgment of conviction entered by the United States District Court for the Eastern District of New York on September 30, 1977 in the above-captioned proceeding.

2. At approximately the time I first met Francisco Estrada-Ponce ("Francisco"), Dennis told me that he had borrowed \$2,700 from Francisco while he was in California and had given Francisco some jewelry which belonged to Dennis and his wife as security for the loan.

3. When we went to dinner at the Hawaii Kai with Francisco in January 1977, there was some mention of the possibility that Francisco would return the jewelry. At or about that time, Dennis said he still owed Francisco \$700. I lent Dennis \$300 to reduce this loan to \$400. I do not remember the exact date Dennis gave the \$300 to Francisco; however, my best recollection is that it was during the month of January 1977, possibly at the time of the dinner meeting.

4. When Francisco called my house on March 26, 1977, Dennis had just arrived about an hour previously and we were in bed at the time. We were both surprised that Francisco was in

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New York and we assumed that he had brought the jewelry and discussed the fact that neither Dennis nor I had the \$400 which he still owed Francisco.

5. On the day of the trial I saw Mr. Termini, the Legal Aid attorney who represented Dennis at the trial for the first time. At that time I asked him a number of questions concerning my role as a witness and he asked me a number of questions about the transcript of the two telephone calls. At that time I mentioned to him that Dennis had known Francisco previously because he borrowed this money from Francisco and had pledged some jewelry in return.

Carolyn Usher
Carolyn Usher

Sworn to before me this
12th day of December, 1977.

Richard W. Scrim
Notary Public
RICHARD W. SCRIM
NOTARY PUBLIC STATE OF NEW YORK
No. 3521711
Qualified in Westchester County
Commission Expires 12-31-80

(Judge Mishler ascended the Bench.)

251

THE COURT: At the end of the Charge I intend to excuse Mr. Lieblein and tell him he does not have to come back tomorrow.

MR. SOROKA: Will the alternate be here in case one of the jurors for some reason doesn't show up, will the other alternate be instructed to come?

THE COURT: They will all come back except Mr. Lieblein who will be excused.

All right, bring the jury in.

(At 3:30 p.m. the jury took its place in the jurybox.)

CHARGE OF JUDGE MISHLER

THE COURT: Madame Foreman;

Ladies and Gentlemen:

It becomes my duty at this point in time to charge you on the applicable law.

I think a good starting point is to understand the various roles that all the participants in the trial play. A trial in this country is known as an adversary proceeding, it means that the parties are litigants and contest over the issues of fact, the Government in this case taking one position and the Defendant taking an opposite

000013

position. That is what we mean by being adversaries, contestants.

In this case there are disputed issues of fact and among them is the issue of the intent as to whether the Defendant came to the motor inn to talk about heroin or to talk about marijuana, or whether he knew that the substance in the envelope was heroin.

There are other issues in the case but I point these out to you just to underscore the nature of the proceeding. The Government took one position on those issues and the Defendant another position.

The lawyers are protagonists, they represent clients and they represent causes. The theory is that if lawyers of comparable ability contest over an issue then the evidence will be developed during the trial and the theory is that the jury will deal with that evidence.

The jury and the Court are in a different position than the lawyers. The jury is the judge of the facts, the Court is the judge of the law. Both are judges in the true sense of the word. Because we are judges, we must be objective and dispassionate. But as between the Court and the

000014

jury there is a line of demarcation, you are the judges of the facts, the Court the judge of the law.

We must recognize that demarcation: You must accept the law as I charge it even though you may disagree with it; I, of course, accept your determination of the facts and your ultimate verdict as to the guilt or innocence of the Defendant, Dennis Bennett, as to each charge in the indictment. I have no opinion one way or the other as to how you should decide it, that is your business. Mine is to charge you on the law.

I think the best known principle in the criminal law is the presumption of innocence. It is a time-honored presumption in Anglo-American law. It means that the jury at the outset must assume and presume and conclude that the Defendant is innocent of both charges in the indictment. Symbolically we say he starts with a clean slate. That presumption prevails and is enough to acquit the Defendant unless the Government proves guilt beyond a reasonable doubt. If the Government proves guilt beyond a reasonable doubt, then it overcomes that presumption of innocence and then you must find the Defendant

(continued on next page)

000015

guilty, but not otherwise.

You have heard the saying Scotch verdict. In Scotland there are three verdicts, guilty, not guilty and not proved. In this country we have only two verdicts, guilty and not guilty, and not guilty including not proved. So your determination really is not to determine whether the Defendant committed the crime but to determine whether the Government proved his guilt beyond a reasonable doubt, and if the Government failed, then you must find the Defendant not guilty.

A reasonable doubt is the kind of a doubt that a reasonable person would have after carefully reviewing all of the evidence in the case. It is a fair doubt, based on reason and common sense and on the state of the record. It is not a speculative, vague, emotional doubt, it is not the kind of doubt you would have because of a normal distaste to find a defendant guilty in the face of proof beyond a reasonable doubt. A reasonable doubt is the kind of a doubt that a reasonable person would have and would hesitate to act on in the most important of his or her own affairs.

Proof beyond a reasonable doubt is therefore

000016

proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The Government doesn't have to prove that every bit of evidence that is offered during the trial is true beyond a reasonable doubt, the Government doesn't have to prove guilt beyond all doubt, the Government must prove the essential elements of the crime charged beyond a reasonable doubt.

The Defendant can rely on the failure of the Government to prove guilt beyond a reasonable doubt. The Defendant is not required to offer any proof. Proof beyond a reasonable doubt doesn't depend on the number of witnesses nor the number of exhibits. It refers to the quality of the evidence that is offered.

Now what is evidence or what is the evidence in this case:

It is the testimony of the witnesses, both the direct and cross examination; it is the exhibits that are marked in evidence; it is the facts which have been admitted or stipulated, and you heard some

000017

of the stipulations. One was if the expert chemist were called to testify he would testify in a certain manner.

It is facts or events which have been judicially noticed, and I judicially noticed that Francisco Estrada Ponce and his brother, Jose, forfeited bail and absconded.

It is the tapes that were marked in evidence and the transcripts that were marked in evidence, which are solely aids; it is what you heard on the tapes that counts.

I think it is important that you understand what is not evidence:

The arguments made by Counsel, the argument of the Government in opening and the argument of Counsel at the closing is not evidence. They serve useful purposes, the opening by the Government was designed to tell you of the testimony that was to come into the trial so that you might more easily follow it. The closing arguments of Counsel focused on the evidence that the lawyers thought was important and also offered theories of exculpation on behalf of the Defendant and inculpation on behalf of the Government based on the evidence. In other

words, the Defendant argued that the Government failed to prove guilt beyond a reasonable doubt and the Government argued that the Government proved guilt beyond a reasonable doubt.

Statements of the Court is not evidence. At the time the Court asked questions of a witness those questions weren't intended to indicate an opinion that the Court had; the only reason for asking the questions was to clear up some area of confusion or at least I thought there was an area of confusion. It had no other purpose.

At times objections were sustained to questions. There were very few objections. You cannot speculate on what the answer might have been if the witness were permitted to answer, and that is on the theory that if the witness did not answer it is not in the record. At times the Court directed the Court Reporter to strike an answer that was given before the Court had a chance to rule, and just as I directed that the Court Reporter strike the answer from the record so you are directed to figuratively strike it from your minds and certainly from your consideration.

Evidence is the method by which a disputed

000019

fact is proved or disproved. There are two general classifications of evidence, one is direct evidence, and that is the testimony of a witness as to what that witness saw or heard. The other, circumstantial or indirect evidence, is the method of determining a disputed fact by drawing inferences from established facts based on good common sense and experience.

The example that I usually give is a hypothetical situation:

If you assume that you were sitting here as a jury in a civil matter, and let us assume Mrs. A was suing Mr. B claiming that Mr. B passed a red light or rather passed a stop sign without stopping and struck her while she was crossing an intersection, and if my courtroom deputy, Miss Dane, were standing on the street corner with me at the particular time and place where the accident occurred, and let us assume she had her back to the stop sign and I were looking directly at the stop sign in the roadway, and if I were called to testify then I might testify that I saw Mr. B's 1977 Cadillac proceeding at 70 miles an hour; that I saw him pass the stop sign and strike Mrs. A:

That is direct evidence of that disputed fact.

You must first identify the disputed fact, I saw the motor vehicle pass the stop sign without stopping and I could testify on that issue and give direct testimony.

Now Miss Dane might be called to the witness stand. She could not testify as to what she saw at the precise second that the motor vehicle passed the stop sign, so she doesn't know whether it stopped before proceeding. But she might testify as to circumstances from which the jury might reasonably draw the inference that that motor vehicle failed to stop.

She might say that while she was talking with me, Mr. B's 1977 Cadillac came into her peripheral vision, that she noticed the speed was about 70 miles an hour, that it passed behind her and travelled approximately a hundred and fifty feet in two or three seconds, that she turned to her left again and saw the motor vehicle travelling at the same speed and struck Mrs. A.

Now I don't think there would be much question in your mind as experienced, common sense individuals to make the inference that that motor

000021

vehicle failed to stop at the stop sign.

The law does not hold that circumstantial evidence is less trustworthy than direct evidence or that direct evidence is of better quality than circumstantial evidence. At times circumstantial evidence is more reliable, at times direct evidence is more reliable. The law requires the jury to find from the proof both on the direct and the circumstantial evidence that the Government proved the particular elements of the crime charged beyond a reasonable doubt.

In this case the issue of intent will be decided by you one way or the other based on the circumstantial evidence. Intent is a state of mind, you can't look into anyone's mind to see what he is thinking, so it is from what he says and does, the actions, the statements, that you will determine whether or not the Government proved criminal intent beyond a reasonable doubt.

You, the jurors, are the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness

000022

testified and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider each witness's intelligence, his or her motive and state of mind, why is the witness testifying, why is the witness saying what she or he is saying, what the witness is thinking of. Take into consideration the demeanor and manner while on the witness stand: Does the witness impress you as being frank, in answering fully, is the witness evasive. Take into consideration the witness' own ability to observe the matters as to which he or she has testified, whether he or she has impressed you as having an accurate recollection as to those matters.

Take into consideration the relationship each witness might bear to either side of the case or to the litigants in the case.

Take into consideration the manner in which each witness might be affected by the verdict, take into consideration the extent which if at all each witness is either supported or contradicted by other evidence in the case.

(Continued on next page.)

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The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised, and no unfavorable inference of any kind may be drawn in the failure of a defendant to testify. A defendant as previously charged may rely on the failure of the Government to prove its case. It would be improper for you to discuss the failure of a defendant who testified during your deliberations.

There is evidence in the case through the testimony of Mr. Sharkey -- and I don't pass on credibility -- if you believe his testimony, I recall it was to the effect that when the defendant was arrested at the motor inn, he said that the substance that he had was for his own use, and I believe he said that he thought that he was coming to see Mr. Estrada Ponce to talk about marijuana. The conduct of a defendant, including statements knowingly made and acts knowingly done, upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in the light of all the evidence in the case, in determining guilt or innocence.

When a defendant voluntarily and intentionally

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offers an explanation, or makes some statement tending to show his innocence, and such explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence of the crime charged.

Whether or not evidence as to a defendant's voluntary explanation, or statement, points to a consciousness of guilt, and the significance to be attached to any such evidence, ~~are~~ matters exclusively within the province of the jury.

A statement or an act is "knowingly" made or done if made or done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

I will shortly come to the indictment.

The indictment is merely the method of bringing a defendant into court to answer charges. The allegations of the counts of the indictment are not to be considered by you as proof. Proof comes through evidence at the trial.

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You are not to attach any significance to the fact that the indictment is brought in the name of the United States. The caption of this case is United States of America against Dennis Bennett. The prosecution and the defendant are equals in this court. The obligations of the prosecution and the rights of the defendant are not to be reduced because the prosecution is by the United States of America.

It is the Congress that finds what is a crime. Most of the federal law is codified.

I have in my hand what is commonly known as the Drug Abuse and Control Act of 1970. Under Section 312 Congress drew certain schedules of drugs that it decided would be carefully supervised and controlled. This controls the manufacture, importation, sale, distribution and use of the various drugs. Heroin is listed as a Scheduled I controlled substance.

Under 341(a)(1), it defines the crime of possessing, manufacturing, or distributing or possessing with intent to distribute as follows, and I will read the pertinent portion, and it is in brief, concise language:

"It shall be unlawful for any person knowingly or intentionally to possess with intent

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to distribute a controlled substance."

That is what we call the substantive crime that Congress said you may not knowingly or intentionally possess with intent to distribute heroin.

In another section, in brief language, the Congress defined the crime of conspiracy in the following language:

"Any person who conspires to commit any offense defined" in the subchapter commits the crime of conspiracy.

Count 1 is the conspiracy count, and it is based on Section 846, and it charges the defendant with entering into a conspiracy to possess with intent to distribute heroin.

This is the language:

"Count 1:

"From in or about December 1976 to in or about March 1977, within the Eastern District of New York and elsewhere, the defendant Dennis Bennett, together with Francisco Estrada Ponce, named herein as a co-conspirator, but not as a defendant, and others known and unknown to the Grand Jury, did knowingly and intentionally conspire to distribute and possess with intent

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to distribute quantities of heroin hydrochloride and cocaine, Schedule I and II, Narcotic Drug Controlled Substances, in violation of Title 21, United States Code, Section 841(a)(1), 'and in violation of' Title 21, United States Code, Section 846."

So Count 1 charges a conspiracy to violate Section 841(a)(1), to wit, a conspiracy to possess with intent to distribute heroin, to go into the business of dealing in heroin.

Count 2, on the other hand, is what we call the substantive crime.

The Government charges that the defendant possessed with intent to distribute or aided and abetted the crime of possession with intent to distribute, and this is the language:

"Count 2:

"On or about March 26, 1977, within the Eastern District of New York and elsewhere, the defendant, Dennis Bennett, and Francisco Estrada-Ponce, named herein as a co-actor, but not as a defendant, did knowingly and intentionally possess with intent to distribute a quantity of heroin hydrochloride, a Schedule I Narcotic

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Drug Controlled Substance."

This is in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

We come to the conspiracy count first, Count 1.

A conspiracy is a combination of two or more persons organized to accomplish an unlawful purpose, in this case, to deal in heroin.

A conspiracy is a kind of partnership in criminal purposes in which one member of the conspiracy becomes the agent for every other member of the conspiracy for matters within the scope of the conspiracy, to advance the purpose of the conspiracy and is within the term of the conspiracy.

A conspiracy is something like a lawful partnership where one member of the business operated by the partnership binds the other members if what he does is within the scope of the business and during the term of the business.

The mere getting together, the mere socializing, is not enough to prove a conspiracy. Persons have the right to assemble together. However, the evidence in the case need not show that the members entered into an express or formal agreement or that they directly by

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words spoken or in writing stated between themselves, as you might find in a lawful partnership, what their purposes were. What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner or through contrivance positively or tacitly came to a mutual understanding to try to accomplish the purpose of the conspiracy, in this case, to deal in heroin.

Now, one may become a member of a conspiracy without knowing all the participants, without knowing all the members of the conspiracy. In a criminal conspiracy, just as in a lawful partnership, not every member is assigned the same duties. At times, members operate at different levels.

The Government's theory, and I just recite the Government's theory so you can understand the charge, is that this was a chain conspiracy in which the various members operated at different levels in order to accomplish the full purpose of the conspiracy. There obviously were members that imported the heroin, members that wholesaled it, distributed it, and retailed it. For example, in this case the Government claims that Estrada Ponce and his brother and

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possibly the woman that came along with them, Anna, were the wholesalers, and probably operated at a higher level than the defendant charged here, that the defendant Bennett was a wholesaler and sold to retailers, and the retailers sell to users.

The Government must prove beyond a reasonable doubt in order to prove that the defendant entered into the conspiracy knowingly and willfully that he knew that there were others operating at different levels in the conspiracy and that the success of the conspiracy depended on the success of each operation along the chain, and that the success of the conspiracy depended on his performing his duty successfully.

I charge you that the acts and declarations of a member of the conspiracy are chargeable against the other members of the conspiracy who are not present if the Government proves the existence of the conspiracy, if it proves that the member who performed the acts or made the statements knowingly and willfully entered into the conspiracy, and then the accused is charged, if the Government proves beyond a reasonable doubt that he knowingly and willfully entered into the conspiracy.

That is a matter of how to deal with the

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evidence.

You will recall at the outset that there were conversations between the witness, Carolyn Usher, and Estrada Ponce. Those conversations were not in the presence of this defendant and they are not binding on him unless the Government can prove or the Government has proved that Carolyn Usher was a member of the conspiracy, then it is binding on this defendant only if the Government proves beyond a reasonable doubt that he knowingly and willfully entered into that conspiracy.

As I say, that is a question of how to deal with the evidence. When it comes to imposing criminal liability, the evidence that you may consider is only evidence of what this defendant said or did, the evidence on the tape of March 26, the evidence of what was found on him, what he said. Those are acts and statements, if you credit these acts and statements, of the defendant as distinguished from conversations between Carolyn Usher and Estrada Ponce.

In addition to proving the conspiracy and proving that the defendant knowingly and willfully entered into the conspiracy, the Government must prove that one of the conspirators committed an overt act.

Now, in proving entry in the conspiracy, the

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Charge of the Court

Government must prove that the defendant participated in the conspiracy knowingly and willfully, in other words, that he was aware that he was a part of a business dealing in heroin.

If the Government proves nothing more than he believed he was dealing in marijuana, you must find him not guilty. The government must prove beyond a reasonable doubt that when he went up to Room 1608 in the Sheraton Motor Inn on March 25, that he went up to deal in heroin. They must prove that he deliberately and intentionally participated in the business, and not by accident, not innocently. As I say, the Government must prove that one of the conspirators, not necessarily the accused, but one of the conspirators thereafter committed an overt act. That means something you can see or hear. It means that the Government must prove that one of the conspirators took a significant step towards the accomplishment of the purpose of the conspiracy to deal in heroin. In other words, just thinking about it and talking about it is not enough. One of the conspirators must do something, and it cannot be just minimal, it must be a significant step.

The mere presence at the scene of the crime and

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knowledge that a crime is being committed are not sufficient to establish that the defendant entered into the conspiracy. He must participate in the conspiratorial activities.

You are not to determine the guilt or innocence of the defendant based on the degree of culpability. It isn't important to determine whether this accused was more culpable or less culpable than Estrada Ponce or his brother or anyone else.

The guilt or innocence of the defendant on the issue of the conspiracy charge depends on whether the Government established the existence of the conspiracy and whether this defendant knowingly and wilfully entered into the conspiracy. The others who are mentioned as part of the conspiracy are not before you.

(continued next page)

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THE COURT: (Continuing) In order to prove

the guilt of the defendant on the conspiracy charged
in count one, the Government must prove the following
essential elements of the crime charged:

One, that on or about and between December
1976 to in or about March 1977 the accused, Dennis
Bennett, and others, knowingly and wilfully formed
a conspiracy to deal in heroin.

Two, that the accused knowingly and wilfully
entered into the conspiracy being aware that it was
for the purpose of dealing in heroin and for the
purpose of possessing heroin with intent to distribute
heroin.

Three, that one of the conspirators thereafter
knowingly committed an overt act.

Four, that the said overt act was knowingly
committed in furtherance of the object or purpose
of the conspiracy, to wit, to deal in heroin.

Now we come to the charge in count two.

The Government's theory is not that this
defendant possessed the heroin with intent to dis-
tribute, with intent to sell it or transfer it, but
rather that he aided and abetted Estada-Ponce to
possess it with intent to distribute it.

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The Government must first prove beyond a reasonable doubt that on or about March 26th Francisco Estrada-Ponce possessed the heroin as alleged in the count.

Two, that his possession was knowing and intentional, in other words that he was aware that he was possessing heroin and he intentionally possessed and controlled it.

And, three, that such possession was with intent to distribute.

That is the distinction between possessing with intent to use it for oneself, the Government must prove that the possession was for sale and not for one's self.

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

Section 2 of Title 18, which is called the Aiding and Abetting Section, reads as follows:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable

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2 as a principal."

3 So the Government's theory is that what happened
4 here was that the accused intended to buy the heroin
5 and that induced and encouraged Francisco Estrada-
6 Ponce to bring the heroin into the Sheraton Motor
7 Lodge or into New York at Kennedy Airport for the
8 purpose of the sale.

9 Every person who wilfully participates in the
10 commission of a crime may be found guilty of that
11 offense. Participation is wilful if done voluntarily
12 and intentionally, and with the specific intent to do
13 something the law forbids.

14 In order to aid and abet another to commit a
15 crime it is necessary that the accused wilfully
16 associate himself in some way with the criminal
17 venture, and wilfully participate in it as he would
18 in something he wishes to bring about.

19 In this case the defendant argues that he was
20 entrapped.

21 The word "entrapment" is a legal term, it has
22 a technical meaning, not that of popular speech or
23 colloquial or ordinary usage.

24 I will explain the word "entrapment" in its
25 legal sense.

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Criminal activity is such, that sometimes stealth and strategy are necessary methods to be used by law enforcement officers.

The function of law enforcement is not only the prevention of crime but also the detection and apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. The defense of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.

A basic feature of entrapment is that the idea or design of committing the crime originated with a law enforcement officer rather than with the defendant; that the defendant had no previous disposition, intent or purpose to commit the alleged offense; that the law enforcement officer or Government employee implanted in the mind of the innocent person the disposition to commit the alleged offense and instigated and incited its commission in order that the defendant might be arrested and prosecuted.

If you find that an agent or employee of the Government merely afforded a favorable opportunity

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or facilities to the defendant for the commission of the alleged crime, such conduct on the part of the Government does not constitute entrapment. Entrapment would occur only if you find that the Government agent induced the defendant to commit the crime charged in the indictment, and that the criminal conduct of the defendant was the product of the Government employee's activity.

If you find any credible evidence creating the reasonable possibility that Francisco Estrada-Ponce instigated and incited or otherwise induced the defendant to commit the crime charged, then the Government must prove beyond a reasonable doubt that such inducement was not the cause or creator of the crime, that is, that the defendant had been predisposed and willing to commit the crime.

If the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offenses charged, and was awaiting a favorable opportunity to commit the offense, then you may find that the inducement, if any, which brought about the actual offense was not more than the providing of what appeared to the defendant to be a favorable or timely or convenient opening

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2 or facility for the criminal activity in which that
3 defendant may have preferred to engage; in such
4 circumstances, you may find that the Government's
5 agent has not seduced an innocent person or persons
6 but has only provided the means for the defendant
7 to effectuate or realize his own then existing
8 purpose.

9 If the Government fails to prove beyond a
10 reasonable doubt that the defendant was ready and
11 willing to commit the offense, then you must find
12 the defendant not guilty of the crime charged.

13 At the time the prior conviction for the
14 offense involving a narcotic transaction was intro-
15 duced, I charge you on the limited use of that
16 conviction. If there is evidence that the crime
17 was committed, and the issue is the defendant's intent
18 whether it was innocent or criminal, then you may use
19 that prior conviction in determining whether the
20 Government has established criminal intent beyond
21 a reasonable doubt. If there is no evidence of the
22 commission of the crime, you may not convict the
23 defendant of the crime charged merely because he was
24 convicted on a prior occasion of a similar crime.

25 At this point I will excuse the jury just for

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a few moments. I must talk to counsel.

Please don't discuss the matter during this period.

The jury is excused.

(At 4:20 P.M. the jury left the courtroom.)

THE COURT: Are there any exceptions or additions?

MR. SOROKA: None by the Government, your Honor.

MR. TERMINI: No, your Honor.

THE COURT: Please bring the jury in.

I'm going to excuse Mr. Lieblein.

(The jury then took its place in the jury box.)

THE COURT: During your deliberations, you may want some of the testimony read back to you or you may want the exhibits that were introduced into evidence. All notes will be passed by your Foreman to the marshal who will be assigned to you and to the Court. Send a note out indicating that you want the testimony read and if you can identify the witness and the subject matter it would be helpful.

When I get a note I take it up with counsel and then I call you into the courtroom and I give you

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what you want or what you are asking for.

Your verdict in effect will be twelve verdicts. Each juror must decide the case for himself or herself. When all agree, then we have a verdict.

The verdict must be unanimous.

Each juror is obligated to discuss the evidence of the case with their fellow jurors. The jury process is a deliberative process, it is an exchange of ideas based on the evidence in the case.

If you arrive at a tentative verdict and after discussion with your fellow jurors you find that you are wrong in the first place, then don't hesitate to arrive at a different verdict. That is what we have deliberations for. It would be improper for any juror to abandon his or her obligation and in effect say, Well, I will go along with the majority. That is wrong. Each of you must decide the case. On the other hand, it would be equally improper for any juror to take an intransigent view and say, Now, look, this is the way I feel about it and no one can change my mind. This is wrong, too. You must be ready to discuss the evidence of the case with your fellow jurors.

Now when you shall have arrived at a verdict,

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2 send me a note and say, "We have a verdict." Don't
3 tell me what the verdict is, just, "We have a verdict."

4 When I get that note I will call everyone
5 into Court and I will ask the Foreman to stand and
6 I will say:

7 I have your note saying you have arrived
8 at a verdict in the case of United States of America
9 v. Dennis Bennett, how do you find the defendant
10 as to count one, guilty or not guilty.

11 And then you will give me the answer.

12 How do you find the defendant Dennis Bennett
13 as to count two, guilty or not guilty.

14 You will then give me the answer.

15 I will then turn to Juror No. 2 and say,
16 You heard the verdict as rendered, is that your
17 verdict.

18 You will then answer yes or no.

19 I will then go down the line and if I get
20 eleven agreements with the announced verdict of the
21 Foreman, then we have a verdict, and that is the
22 first time we have a verdict when it is announced in
23 open Court. That is why you should not give it to
24 me before it is announced in Court.

25 Don't tell me how you stand during your

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2 deliberations, don't tell me that you are ten to two,
3 eleven to one, six to six. I am not interested,
4 I'm only interested in when you have a verdict.

5 At this point I am going to excuse you,
6 Mr. Leiblein, because I understand you have a
7 personal problem.

8 ALTERNATE JUROR NO. 1: Yes, Sir, I do.

9 THE COURT: So if you have any personal
10 belongings in the jury room, you may take them now.

11 Do we have any instructions as to whether the
12 jurors are to return to the Central Jury Room
13 tomorrow morning?

14 THE DEPUTY CLERK: Well, the last I heard
15 from the jury room clerk is that the jury is to
16 return to the Central Jury Room.

17 THE COURT: You will not return to the Central
18 Jury Room and get your instructions, but you are to
19 return tomorrow at 10:00 o'clock. Please don't
20 report to the Central Jury Room tomorrow, you will be
21 marked present by me.

22 I want you to come to the jury room directly.

23 Please come on time, we can't commence until
24 we know everyone is here.

25 Now we are before a verdict and this is a

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very critical time in a criminal case because it is the time when you are going to start your deliberations and it is a time when I think you are most impressionable, so please make certain that no one at home, in fact, no one even walking with you to the subway, your fellow jurors, talk to you about the case.

When you reassemble tomorrow, please don't talk about it then.

When you are all assembled tomorrow then I will bring you into the courtroom and I will assign marshals in whose custody you will be, and then I will direct that you start your deliberations.

But you are not to talk about it before that time and certainly not with any outsiders. I am thinking of your folks at home and friends.

When the case is over, after you have rendered a verdict, then I have no control over you and if you want to talk about it then, you may talk about it then, but not until that time until you have rendered a verdict.

So the jury is excused.

Please come here by 10:00 o'clock and that will give you all day to arrive at a verdict.

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The jury is excused.

(At 4:25 P.M. the jury left the courtroom.)

MR. TERMINI: Judge, can my client have a brief word with his wife?

THE COURT: Is there any problem there?

THE MARSHAL: No, but inside.

THE COURT: Surely.

MR. TERMINI: Thank you.

THE COURT: Please come in promptly by 10:00 o'clock, promptly at 10:00 or before.

All I will do tomorrow is just swear in the marshals and excuse the alternate and I will do it this way just in case one juror is unable to get to the Court.

It was too late to start tonight and I have this worry about all the jurors being able to attend.

MR. SOROKA: Judge, I would just have one request, and that is with the Court's permission, may I leave the apparatus in the courtroom and not dismantle it.

THE COURT: You are not talking about your exhibits?

MR. SOROKA: No, we will take the appropriate steps with respect to them, I am thinking of the

wiring of the courtroom.

THE COURT: I have never found anybody disturbing the wiring, so leave it here.

Does that include the earphones or will you take them?

MR. SOROKA: We will take all of the equipment, just the wiring is what we need here.

THE COURT: Good enough.

Bring all your exhibits in tomorrow --

MR. SOROKA: Yes, Sir.

THE COURT: (Continuing) If they ask for the exhibits we will have them.

There is one thing you didn't do and that is mark the Government's request to charge.

THE CLERK OF THE COURT: Government's request to charge marked as Court's Exhibit No. 1.

THE COURT: All right.

All right, gentlemen, thank you.

You will see that he has a visit.

I want everyone to remain in the courtroom until the jurors have left, so wait about five minutes.

(At 4:30 P.M. the Court session was concluded for the day.)

* * * * *

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DOCKET NO.

77 CR 201

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date:MONTH DAY YEAR
9 30 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Chris Termini

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY. to counts 1 & 2FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T.21: USC 5841(a)(1) and 846, T.18 USC 92 in that on or about December 1976 through March, 1977 the defendant with another did knowingly and intentionally conspire to distribute and possess with intent to distribute quantities of heroin and or or about March 26, 1977 the defendant did knowingly and intentionally possess with intent to distribute a quantity of heroin.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

10 years on counts 1 and 2 and a special parole term of 20 years to run concurrently with each other. Special condition of special parole is that if the defendant is deported he is not to re-enter the United States, its territories or possessions during his special parole term. On motion of Asst. U.S. Attorney Soroka the second felony information is dismissed.

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Date

9/30/77

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FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D. I

APR 18 1978

A.M.

(77 C 2473) 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DENNIS BENNETT,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

77 CR 201

Memorandum of Decision
and Order

April 17, 1978

A P P E A R A N C E S :

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Of Counsel

MISHLER, CH. J.

000049

Petitioner Dennis Bennett moves for an order vacating and setting aside this court's judgment of conviction, pursuant to 28 U.S.C. § 2255. The government opposing, moves to dismiss.

On September 30, 1977, petitioner was convicted after a jury trial of (1) conspiracy to distribute quantities of heroin and (2) aiding and abetting in the knowing and intentional possession with intent to distribute a quantity of heroin, violations of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 846. Petitioner was sentenced to concurrent ten year prison terms on both counts, to be followed by a twenty year special parole term. As a special condition of parole, the court directed that if petitioner be deported, "he is not to re-enter the United States, its territories or possessions during this special parole term." Notice of appeal was filed on September 30, 1977, but appellate proceedings have been stayed pending the disposition of the instant application.

As the sole ground for the instant motion petitioner claims that he was deprived of his constitutional right to effective assistance of counsel at trial, in that his trial attorney allegedly failed to present certain evidence which might have constituted a substantial defense.

The evidence adduced at trial can be summarized as follows. On March 25, 1977, Francisco Estrada-Ponce and two other persons were arrested at Kennedy Airport by an agent for the Drug Enforcement Administration. Francisco, who was in possession of approximately two kilos of heroin, offered to cooperate with the agent and make a "controlled delivery" to his purported buyer, Bennett. Francisco and the agent thereupon checked into adjoining rooms at the Sheraton Motor Inn in Manhattan, where they placed a small sample of the heroin in an envelope for the purported buyer.

During the early morning of March 26, 1977, Francisco made two monitored telephone calls to Carolyn Usher, petitioner's girlfriend, in an attempt to contact Bennett. With Bennett at her side, Usher claimed he was not there, but promised to get Francisco's messages to him. Francisco explained he was in from Mexico with the "merchandise," and asked that she relay the message to Bennett with directions for him to call.

Later that night, Bennett visited Francisco at the Sheraton. With agents in the adjoining room monitoring and taping their conversation, the two men discussed the "stuff" which Francisco had for Bennett, repeatedly referring to it as

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"chiva". Francisco reassured Bennett of its purity, and they discussed its weight and cost. Bennett then agreed to take a sample of it to some people for testing. As he departed the hotel room, Bennett was arrested by monitoring agents and was found to be in possession of both the heroin sample and two small cards containing Estrada's name, an address, and phone number.

Petitioner relies on alleged facts undisclosed at trial as the basis for this petition. He claims that he had negotiated a loan of \$2,700 from Francisco in 1976 for which Bennett had pledged some of his jewelry; that he had repaid all but \$400, in part with monies provided by his girlfriend Usher; but that Francisco continued to retain the jewelry while the loan remained outstanding. In her affidavit in support of the instant petition, Usher recounts the events surrounding a dinner in January, 1977, attended by Bennett and Francisco at which she recalled some mention of the jewelry and some discussion about its return.

It is undisputed that petitioner informed an attorney of the Legal Aid Society prior to trial of the purported loan/pledge transaction, and that a written memorandum containing

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a reference to the information had been given to Bennett's trial counsel in advance. Both Usher and Bennett also claim that they informed Bennett's trial attorney of the transaction before trial. Trial counsel, it appears, recalls neither these verbal communications nor the written reference to the pledge in the memorandum.

At trial, the Government initially took the position that Bennett aided and abetted Francisco on March 26, 1977. But because Francisco had become a government agent on that date, the Government abandoned that theory and sought to prove that the conspiracy existed prior to Francisco's March 25, 1977 arrest; that when Bennett arrived at the hotel, he intended to carry out the preplanned heroin transaction.

Bennett now seeks to press the theory that the purpose of his meeting with Francisco was to repay the loan and secure the return of his jewelry. Petitioner contends that neither he nor Usher had any prior knowledge of Francisco's New York visit; that when he contacted them, they thought he had come to New York to collect on the debt; and that Bennett had gone to meet him intending to repay the loan and not to buy heroin. Petitioner urges that had the jury been presented with the

loan/pledge defense by his trial counsel, it could have easily inferred that it was the debt that prompted Bennett's visit to the hotel and not a previously arranged heroin transaction. Petitioner argues that had the jury entertained reasonable doubt as to the purpose of his visit, it would have been obliged to acquit. Any spontaneous decision to assist Francisco in the sale of heroin, Bennett argues, would not have constituted the crimes charged. The Government, petitioner claims, had to prove a prior conspiracy in order to secure a conviction under the indictment.

Petitioner urges that his trial counsel wholly failed to grasp the essence of the Government's ultimate theory, and consequently failed to press upon the jury Bennett's lack of prior knowledge as to the reason for Francisco's visit. He claims that by reason of his failure, the jury was misled into thinking that Bennett's actions in Francisco's hotel room on March 26 were the illegal acts for which Bennett was being tried. Petitioner further maintains that trial counsel's omission was not the result of an informed tactical decision, but was caused by his incompetence.

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The Government simply argues that the theory of defense asserted by trial counsel, if the entire record is considered, is superior to that now pressed by petitioner. Trial counsel urged the theory that the term "chiva" referred to by Bennett and Francisco during their conversation at the Sheraton was a slang term for marijuana; that Bennett had gone there to purchase marijuana and not heroin. Wholly consistent with this defense were statements made by Bennett at the time of arrest; petitioner told agents he had come to the hotel in order to purchase a quantity of marijuana.

Incompetence of counsel, in order to constitute a sixth amendment violation, must be such "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S.Ct. 478 (1950); Accord, United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir.), cert. denied, ___ U.S. ___, 97 S.Ct. 2958 (1977); United States v. Medico, 557 F.2d 309 (2d Cir. 1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (2d Cir. 1976). It is not enough that counsel fails to assert a tenable defense. Defense counsel cannot be and is

not required to brief and argue every conceivable argument.

United States v. Daniels, 558 F.2d 122, 126 (2d Cir. 1977).

The decision as to which claims should be advanced are largely matters of trial tactics which a court sitting in review should not readily second guess. Id. at 126.

A necessary aspect of trial preparation requires defense counsel to sift available information and reject implausible or useless defenses and alibis. Counsel's mental process cannot be scrutinized and evaluated in retrospect in the absence of clear evidence of ineffective assistance of counsel.

The strength of the prosecution's case is highly relevant in the analysis of petitioner's claim. United States ex rel. Crispin v. Mancusi, 448 F.2d 233 (2d Cir.), cert. denied, 404 U.S. 967, 92 S.Ct. 346 (1971). "If the case is overwhelming, there may be little that defense counsel can do, and counsel will very likely be faulted by the dissatisfied client either for doing too much or too little." Id. at 234 (citation omitted). In the same vein, the quality of representation cannot be abstractly measured without reference to the merits of the defendant's case. United States ex rel.

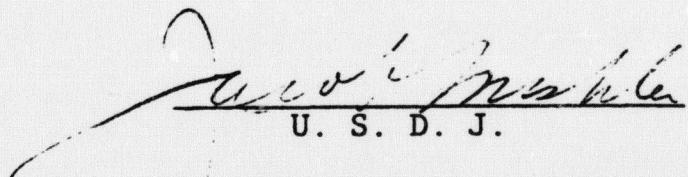
000056

Testamark v. Vincent, 496 F.2d 641, 643 (2d Cir. 1974), cert. denied, 421 U.S. 951, 95 S.Ct. 1685 (1975).

Given this framework, we cannot say that petitioner's contention is meritorious. Trial counsel appears to have exercised his professional discretion in immediately dismissing the plausibility of the purported loan/pledge defense, and to have instead advanced a cogent and more credible defense theory based on the strength and nature of the Government's case. The statements Bennett made to agents at his arrest were exculpatory in nature; trial counsel recognized their import and sought to build a defense around them. It was a credible tactical decision, and a sound defense given the nature of the evidence against petitioner. In no way can counsel's approach be regarded as ineffective.

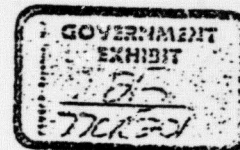
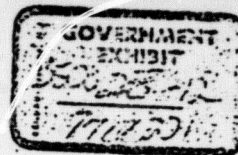
Accordingly, petitioner's motion for an order vacating and setting aside the judgment of conviction is in all respects denied. The Clerk of the Court is directed to enter judgment in favor of the respondent and against petitioner dismissing the petition, and it is

SO ORDERED.


U. S. D. J.

TAPE CONVERSATIONS

March 26, 1977 - 8:25 P.M.



I BENNETT
II FRANCISCO

I I was asleep
II Oh, too bad, eh, what's going on?
I: (Inaudible word)...Ana come?
II: No, eh, eh, downstairs, at a restaurant,
 downstairs with my brother.
I: Your brother come?
II: Yea...(inaudible words) I tell you your stuff
 up here on top.
I: So once, eh (inaudible words) I wanta go
II: O.K.....(inaudible words)
I: Chiva
II: Oh, Chiva?
 [Movement Noise, no conversation].
II: So what's going on, where is eh, where is Carol?
I: Downstairs, she's downstairs, she didn't come
 up, you know, no parking space.
II She no?
I: No
II: I'm going to take this, take this, test out right
 away. Eh, what's this here now.
I: The pure stuff
II: Chiva?
I: You know, CHIVA

000058

Ex. A

I: O.K. cool
II: The pure stuff
I: How much it it?
II: I don't know I gotta get the weight.
I: O.K.
I&II (Inaudible words)
I: You got about a kilo, you got about a kilo.
II: 2 kilos, with a kilo of cut...inaudible.
I: How good is it?
II: It's pure, pure, pure. Pure stuff, pure stuff.
I: Pure stuff eh, how much is a kilo?
II: I don't know...should take three (inaudible)
I: Inaudible...the cut too, eh, you know
II: Inaudible...the cut...
I: O.K. good let me get on the case test. I'm going to take it to some people.
II: Money, you give me money, a little money for me?
I: No I don't have no money Frankie.
II: Oh my God, I've run out of money, you know, have no money here.
I: Well I'm going to try and get you some. I'll see if I can sell some of this tonight.
II: Cause, I gotta go tomorrow, you know.
I: You gotta go tomorrow?
II: I have to go with my brother (inaudible) do it, right here, you know and Ana is sick.
I: Ooh
II: He, he run out of, he rent a car at airport, you know my brother he got the Hertz cars, you know and eh, he rent a car, and eh, take care Ana downstairs to the streets over there 42. Forty second and I wait for there last night.

000059

I: Yea, but you didn't call the house, did you?
II: Yea, but that phone not answer.
I: May I wasn't in.
II: Eh, Carol said he's in (inaudible word)
I: Oh yea, oh because some people was calling the house and telling her and writing my wife and telling my wife I was living with her.
II: Oh no, fuck
I: That's why she pulling the phone off.
II: Oh, O.K.
I: Em, God-Damn
II: You do something right away man because I, gotta move these things and... go back.
I: If you had a scale I could
II: Heh?
I: If you had a scale I could put some up there
II: Oh, no
I: And weigh it, so I could pay you
II: Well go sell, go weigh these things, sell this thing and come on back with the scale, with a guy whatever.
I: This I'm going to give this for sample I'm going to let them check it out.
II: Oh, oh, O.K.
I: (Inaudible) then try and sell it like it is
II: Oh, o.k.
I: It's not cut, right, it not cut?
II: No, no, no, no, it's the pure stuff.
I: Oh, is it pure?
II: The pure stuff, yea.
I: It's going for 33?
II: Yea, 33.

[END OF RECORD CONVERSATION].

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However, the transmitter receiver was still in operation and recorded the following brief, semi-audible words:

Special Agent: Hold it!.....(Inaudible)
FRANCISCO: Wait, wait a minute.....inaudible
God damit.
Special Agents: You all right now?
Special Agents: Inaudible conversation, then take
it easy, take it easy.

[END - RECORDER TURNED OFF].

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5.

TAPED CONVERSATIONS

March 26, 1977 at 12:15

F: FEMALE VOICE

M: MALE VOICE

F: Hello

M: Hello Carol?

F: Oh well, hi

M: Hello

F: How you doing?

M: All Right.

F: Oh you just got back from Mexico?

M: Yea I come from Mexico.

F: Oh you should have seen my phone busy. I wanted to call you try to get with you.

M: Oh I call you all night, I you all night Carol.

F: No, you know why my phone, you know I have my phone on the jack and I plug it out sometimes thats why you can't get in touch with me.

M: Oh yea.

F: Well we talk about you every day, this guy call the other day, he asked for you, what you doing, or when you coming or something, you know I tell I don't know cause we haven't heard. Cause remember you called and gave me the new phone number?

M: Yea

F: We've been calling and calling, calling they say you not there.

M: Yea but I got some problems, you know down there in Mexico, too hard you know.

000062

EX B

F: Aha, things hard, How's Ana?
M: Ana, Ana is pretty good she's with me.
F: How is, listen you going to bring her back right?
M: Yea
F: I was thinking about her the other day you know
I could give her, you know like the baby shower,
because you know like a party for the baby.
M: Yea
F: Right cause the baby's coming soon right.
M: Yea coming soon the baby
F: Aha
M: A ha. Hey, whats happening with my buddy
F: Well, he is all right, I seen him every time, but,
em he, I won't probably see him until later on.
You want him call you?
M: Look, I'm in the Sheraton Hotel.
F: Where?
M: In the Sheraton Hotel
F: In New York?
M: Yea I'm here in New York
F: Are you kidding?
M: Really
F: Ana there with you?
M: Eh?
F: Ana there with you?
M: Yea Ana is with me
F: When you came?
M: Last night. I try call you, all last night.
F: No the phone is was out, you know.
M: Nobody answer

000063

F: No its, see we don't hear the ringing when I plug it out the wall, you hear it ring but I don't hear it ring

M: Eh?

F: I don't hear the phone ring, you know cause I pull it out, I can turn it off and turn it on.

M: Uh huh, O.K.

F: So, ah, you have the number then?

M: Yea I got the, I am, I am, I am in Room 1608

F: Whats that the one on 40th Street?

M: Yea the one I stay all the time. Yea the Sheraton Hotel.

F: Yea, its better that you didn't go to the Stadium, cause the guy, you know.

M: Yea its too many people there

F: Uh huh

M: Look tell, eh tell, tell Dennis I got the merchandise, O.K.

F: Uh huh O.K. whats the room number

M: Room number, its 1608

F: 1608

M: Yea

F: O.K. well eh, I don't know, I have to wait till he calls me

M: Uh huh

F: And then, ah, I'll tell him you know

M: O.K.

F: But I.. the number there is what 5, 6, you don't know the number?

M: Yea 695-65 double 0

F: Uh huh, and 1608

000064

M: 1608

F: Uh huh, o.k. then well I'll have him call you
or then I'll call you back later, o.k.?

M: O.K. tell him as soon as he can you know, because
I gotta, I gotta leave, I gotta go back down there,
you know some peoples waiting for me down there.

F: Uh huh

M: O.K. so tell -

F: By next week?

M: No I gotta go back eh, in a couple, eh tomorrow,
I like to go back.

F: Uh huh, O.K. then well I'll tell him I'll try and
get in touch with him, O.K.?

M: O.K.

M: O.K.

F: O.K. and I'll call you back

M: What, what time, what time you coming eh?

F: I don't know I'll try and call now but see I don't
know, but I'll call you as soon as I hear from
him and I'll let him call you and then we'll
come down there later on.

M: O.K. you don't got any phone numbers to give it
to try to call for him?

F: For him?

M: Yea

F: No, just eh, just this friend someone, he usually
be there, sometimes, you know but I just call
there cause I wanta get in touch with him, but
he's not there.

M: O.K.

F: But I'll try and get in touch with him, he's
supposed to call me and I'll have him call you,
O.K.?

000065

M: O.K. so eh Carol, I'll wait for your call O.K.
F: Right O.K. fine bye-bye.
M: Bye-Bye.

[END OF FIRST PHONE CALL].

TAPED CONVERSATIONS

March 26, 1977 - 7:00 P.M.

F: Hello
M: Hello, Carol there?
F: Oh hi Frankie
M: Hello Carol
F: Hi I haven't heard from DENNIS yet.
M: You didn't touch with him
F: No I can't get in touch with him and I haven't
heard from him, but as soon as I hear from him
I'll tell him to call you O.k.
M: O.K.
F: I'm right here I'm waiting for him to me cause
I never been out the house I'll be right here,
O.k.? In case if he calls you know?
M: Aha
F: I'll give him your message for him to call you.
M: O.K., tell to call me right away because eh I
gotta, gotta go you know
F: Yea
M: I can't stay so long here.
F: Aha
M: O.K.
F: O.K. then
M: O.K.
F: Bye Bye
M: Bye

000066

[END]

1 MR. SHARKEY: The speaker, your Honor?

2 THE COURT: Oh, the speaker is down on the floor?

3 MR. SHARKEY: The speaker is on the floor, sir.

4 THE COURT: All right, let us see how it works.

5 Now go ahead.

6 (The tape was then continued to be played.)

7 THE COURT: Hold it right there.

8 I can't understand a word of it here.

9 Where is it on the transcript?

10 MR. SOROKA: I believe the next word should be,
11 "Chiva" "Oh, Chiva?"

12 That is about in the middle of the first page.

13 THE COURT: All right.

14 Try it now, go ahead, continue playing.

15 (The cassette was then continued to be played.)

16 THE COURT: Can you hear this?

17 Do you understand it?

18 MR. SOROKA: All of this is inaudible, Judge.

19 THE COURT: What are the next words?

20 MR. SOROKA: "So what's going on, where is
21 he, where is Carol?"

22 THE COURT: Let us hold it for a moment.

23 Maybe it is because where the loud speaker is.

24 I will sit in a juror's seat and see if I can
25 hear it from here.

000067

1 (Judge Mishler then took a position in the
2 jury box.)

3 THE COURT: I have not been able to make a word
4 out of it, and I don't think it is the tape, I think
5 it is the loud speaker or the amplifier.

6 What is the next sentence, you say?

7 MR. SOROKA: I believe he has just said, "I
8 am going to take this, take this, test outright away."

9 It is about four lines up from the bottom.

10 THE COURT: All right, go ahead.

11 (The tape was then continued to be played.)

12 THE COURT: Who is one and who is two?

13 MR. SOROKA: Will you shut it off?

14 THE COURT: Who is one and who is two?

15 MR. SOROKA: Number one is the defendant, Mr.
16 Bennett, and number two is Francisco Estrada Ponce.

17 THE COURT: I see, you have them marked up there.

18 MR. SOROKA: Yes, sir.

19 THE COURT: Ok.

20 (The cassette was then continued to be played.)

21 THE COURT: That is it?

22 MR. SOROKA: No, there is more.

23 THE COURT: What is that, page five now?

24 MR. SOROKA: Page four now.

25 That was at the end, after he left the room

000068

1
2 Estrada Ponce?

3 A No.

4 Q Did you see either of those two men that night
5 when you went out to dinner?

6 A Yes, we were together.

7 Q Were there different conversations with each
8 other?

9 A No, we were all talking together.

10 Q Did Mr. Bennett talk to Mr. Francisco Estrada
11 Ponce?

12 THE COURT: In your presence?

13 A Yes, he did.

14 Q And do you know the conversations that they had?

15 MR. TERMINI: Objection, your Honor.

16 THE COURT: Overruled, I will allow it.

17 Did you hear the conversations that they had?

18 THE WITNESS: Yes, we talked about the band,
19 the food, and we went out --

20 BY MR. SOROKA:

21 Q Did you hear all of the conversations that they
22 had?

23 A Yes, I did.

24 They didn't talk much.

25 Q And where did you see these conversations

000069

1
2 taking place?

3 A In the restaurant.

4 Q Did they take place anywhere else?

5 A No.

6 Q There came a time that you left the restaurant;
7 is that correct?

8 A Yes.

9 Q Where did you go?

10 A We went home.

11 Q Did you go to -- where is home, by the way?

12 A Home, well, that is where he takes me home,
13 that is where I go home.

14 Q Did you go anywhere, did you go anywhere between
15 the time that you left the restaurant and the time that you were
16 at your home?

17 A We took Mr. Estrada and his girlfriend back
18 to the hotel.

19 Q Now, at what time, if you can recall on the night
20 that you went to dinner with Mr. Ponce and his girlfriend,
21 did you see Mr. Bennett for the first time?

22 A If I saw him for the first time that night?

23 MR. TERMINI: Objection as to the form of the
24 question.

25 THE COURT: Sustained as to the form.

BY MR. SOROKA:

000070

1
2 Q When for the first time on the night you went
3 to dinner, did you see Francisco Estrada Ponce?

4 A When for the first --

5 Q What time did you go to the hotel to pick him
6 up?

7 A I don't remember.

8 Q Do you remember what time you saw Dennis
9 Bennett for the first time that day that you went to dinner
10 with him?

11 A We were together earlier.

12 Q What time?

13 A I don't know.

14 Q Approximately, in the morning, afternoon or
15 evening?

16 A Morning, I guess.

17 Q From the morning until the time that Dennis
18 Bennett took you home, did he ever leave your presence?

19 MR. TERMINI: Your Honor, I am going to object
20 to this line of questioning by the United States
21 Attorney.

22 THE COURT: May I have the question?

23 (Previous question read.)

24 THE COURT: Do you understand what that means?

25 THE WITNESS: Yes.

000071

1 Q And where did he tell you that he was?

2 A At the hotel.

3 Q And after you got that information, you told that
4 to Mr. Bennett who was right next to you; is that correct?

5 A Yes.

6 Q There came a time later that night that you got
7 another call from Mr. Ponce; is that right?

8 A Yes.

9 Q You have any present recollection of the contents
10 of that telephone conversation?

11 A He called and he asked me the same questions.

12 Q What questions were they?

13 A If Dennis -- If I had gotten in touch with him
14 and I told him no.

15 Q So you lied to Mr. Ponce; is that correct?

16 A Yes, because he was there with --

17 MR. SOROKA: Judge, would you instruct the
18 witness --

19 THE COURT: Strike out the reason, answer the
20 question that is asked of you and nothing else.

21 A Yes, I lied to him.

22 Q Did there come a time after 7:30 that you and
23 Mr. Bennett left your place?

24 A Yes, we left.

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Q Where did you go?

A We went up town to the hospital, we were going to the movies.

Q Did there come a time that you reached the vicinity of 42nd Street in Manhattan?

A Yes, sir.

Q What happened when you got there?

A I don't know.

Q Well, how did you get to 42nd Street?

A We drove down there.

Q Who is "We"?

A Me and Mr. Bennett.

Q And what happened when you arrived there?

A I was outside waiting for him.

Q He went up to the hotel room alone; is that correct?

A Right.

Q He told you to wait in the car?

A Yes, I waited in the car.

MR. SOROKA: I have nothing further.

Thank you, Judge.

THE COURT: Mr. Termini.

CROSS-EXAMINATION

BY MR. TERMINI:

000073

1
2 Q Carol, do you remember the day of March 26th,
3 77, when you got these phone calls from Francisco?

4 A Yes, sir.

5 Q How many calls did you get?

6 A Well, I talked to him twice, I don't know if
7 he called before or after because the phone kept ringing, but
8 I didn't answer it because I didn't want the line to worry
9 me.

10 Q How many times do you remember hearing the
11 phone ring on the different occasions when you didn't answer?

12 A A lot of times.

13 Q More than a couple of times?

14 A Maybe more than a couple of times.

15 Q Is there anything else about your meeting with
16 Francisco and his wife sometime in January that you haven't
17 already told the ladies and gentlemen of the jury, is any-
18 thing else that you can remember about that conversation with
19 them?

20 A No.

21 I met him twice, we don't communicate, they don't speak
22 English.

23 Q What language do they speak?

24 A Spanish. I don't speak Spanish.

25 Q You don't speak Spanish?

000074

English or broken English?

MR. SCROKA: Objection as to the form.

THE COURT: Overruled, I will allow it.

A Broken English.

Q You had difficulty in understanding what he was talking about?

A Yes, I always asked him twice what is he saying.

MR. TERMINI: I have no further questions.

MR. SCROKA: Nothing further, your Honor.

THE COURT: You may step down.-

Thank you.

(The witness was excused.)

THE COURT: Next witness.

(continued next page)

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15

1

Sharkey-direct

2

made certain statements to you?

3

A Subsequent to being advised of his rights, he

4

did.

5

Q And he gave you certain information?

6

A Yes.

7

Q You spoke to him how many hours?

8

A Approximately 3 and a half to four.

9

Q Did there come a time after getting all of this

10

information from Mr. Ponce that you left the International

11

Arrivals Building?

12

A Yes.

13

Q With whom did you go?

14

A I left with -- me together with my co-agents

15

and Mr. Francisco Estrada-Ponce.

16

Q Where did you go?

17

A We went to the Sheridan Motor Inn located on

18

42nd Street on the west side and 12th Avenue in Manhattan.

19

Q Did you go there as a result of information

20

that was supplied to you from Francisco Estrada-Ponce?

21

A That's correct.

22

Q What did you do when you arrived at the Sheridan

23

Motel in Manhattan?

24

A We checked into 2 adjoining rooms of the hotel,

25

room 1608 and 1610.

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16

Sharkey-direct

2

Q And who was in which of these 2 rooms?

3

4

A We checked in Mr. Estrada-Ponce in 1608 and myself and co-agents checked into the adjoining coupled room, 1610.

5

6

Q You didn't leave Estrada-Ponce in 1608 alone?

7

A No, sir.

8

9

Q Did you search him before he went into that room?

10

A Yes.

11

12

Q During the time he was in 1608, was Francisco ever out of the presence of any of your agents?

13

A No, sir.

14

15

Q Now, what if anything did you do with respect to this heroin in room 1608?

16

17

A We had taken a representative sample of the heroin seized earlier that evening from the airport from Estrada-Ponce, Francisco.

18

19

Q Why did you do that?

20

21

A To initiate a controlled delivery of the substance.

22

Q What is a controlled delivery?

23

24

25

A Basically, controlled delivery is the natural delivery of the narcotic to its ultimate recipient wherever that may be, without showing, or an attempt to, without

000077

Sherkey-direct

showing that it was interfered with in any way by any law enforcement officials.

Q You took a representative sample of the heroin you seized from Francisco Estrada-Ponce?

A That's correct.

Q In 1608, what did you do with the heroin?

A In 1608 we set the heroin up in the corner of the room in the suitcases. Further, I opened the bag up, the representative sample, took a smaller sample of that and placed it in a Sheridan Motor Inn envelope that we found in the hotel near the phone.

Q As a result of the conversations you had with Mr. Ponce, what did you do with that envelope?

A I placed it in a phonebook right under the phone adjacent to the bed.

Q Why did you do that?

A Because he informed me that would be a sample and it would be needed by the recipient upon the recipient's arrival at the hotel.

Q Did Mr. Francisco Ponce, in the course of your conversation, tell who the recipient was intended to be?

A Yes.

Q What name did he tell you?

MR. TERMINI: Objection.

000073

18

Sharkey-direct

THE COURT: Sustained.

Q Let's talk about room 1608, the room, were there any surveillance measures taken with respect to that room?

A Yes.

Q Can you describe that?

A We placed a transmitter receiver recorder in that room. We put the sample in --

Q You placed a transmitter in which room?

A 1608.

Q And that transmits to where?

A Room 1610.

Q What did you have in room 1610?

A A Kel kit recording device to go with a receiver.

Q Before you set up any of these transmission devices, did you receive consent to do so from Francisco?

A Yes, I did.

Q So you had a transmitter in 1610 -- excuse me, a transmitter in 1608 and recorder in 1610?

A Right.

Q Francisco and some heroin was in room 1608?

A Correct.

Q I would like to direct your attention -- when

000079

Sharkey-direct

was all of this arranged and organized?

A I was arranged and organized immediately upon us arriving, or thereafter as soon as we checked into the hotel room, which was about, I would say, close to 2:00 a.m. of the morning of the 26th of March.

Q Now, I would like to direct your attention to later on on the 26th day of March at approximately noontime, or thereabouts, and ask what if anything Francisco did in your presence?

A Francisco Estrada-Ponce made a taped telephone call.

Q Did you receive his consent to do so?

A Yes.

Q Were you present when it was recorded?

A Yes, I was.

Q Approximately what time was that?

A The first phone call -- well, I will back up a minute or 2. Prior to the first phone call being picked up by the other end, we made a few other phone calls, but there was no answer and they obviously weren't taped.

Q Did there come a time when someone answered this phone?

A Yes.

Q What time was that, about?

000080

2. 1
2 A Well, at approximately an hour and a half later,
3 about 8:20 or 8:30 P.M., Francisco Estrada received a knock
4 on his door to room 1608, and a gentleman later identified as
5 Dennis Bennett was let into the room by Frankie --

6 THE COURT: Did you see Dennis Bennett enter the
7 room?

8 THE WITNESS: No, sir, I did not.

9 THE COURT: So when you say, "Later identified,"
10 you didn't identify him.

11 THE WITNESS: I identified him when I arrested him,
12 within five to ten minutes later.

13 THE COURT: Oh, I see.

14 All right.

15 BY MR. SOROKA:

16 Q There was a knock on the door of Room 1608?

17 A That is correct.

18 Q Where were you?

19 A I was on the door, the adjacent door that separates
20 Room 1608 from 1610, there is a common one; if you have a
21 suite of rooms there usually is a common door. I was on
22 that door attempting to overhear the conversation.

23 Q All right.

24 After the knock on the door, the agents that were in
25 Room 1608 went into 1610?

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2 A Exactly .

3 Q The door was then closed?

4 A Exactly.

5 Q And you took a position at the adjoining door?

6 A That is right.

7 Q When you said, "Attempting to hear the conversation
8 did you hear the conversation?

9 THE WITNESS: I heard bits and pieces of it,
10 not in total.

11 Q Before leaving the room, did you or another
12 agent activate that transmitter?

13 A That is correct, one of my co-agents.

14 Q At the doorway you say you heard the conversation
15 in the next room, in Room 1608?

16 A That is correct.

17 Q Of that conversation, what were you able to
18 hear?

19 A I overheard Frankie, I overheard the word
20 "Chiva" used several times by those people in the room, I
21 overheard words to the effect of scales, "I need a scale,"
22 I overheard the words, "Pure," and "Pure stuff" by both
23 people in the room a few times.

24 I heard the words "Tested", "Tested out."

25 The last thing I heard was the numbers, 33, said by both

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1 Q What if anything did you do?

2 A I immediately identified myself and placed him
3 under arrest.

4 Q And was he searched?

5 A He was.

6 Q What if anything was retrieved at the point of
7 the arrest?

8 A At the point of the arrest, in the hallway, when
9 we patted him down for weapons, in the right coat pocket in
10 a Sheraton Hotel small envelope was a small amount of brown
11 rock heroin which I had placed in that envelope earlier in
12 the evening.

13 Q Did there come a time immediately after that
14 seizure that you had a conversation with Dennis Bennett?

15 A There did.

16 Q Where and when did that take place?

17 A Immediately --

18 THE COURT: Hold it, wait a minute now.

19 The jury is excused.

20 (3:35 P.M. the jury left the courtroom.)

21 THE COURT: Is there any question about the
22 voluntariness of this?

23 MR. TERMINI: No, not there, none.

24 THE COURT: All right.

25 MR. SOROKA: Your Honor, I would point out that

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2 THE CLERK: One card marked as Government's exhibit
3 11 for identification.

4 MR. SOROKA: Your Honor, is there some way that
5 it may be tagged by quite a small tag?

6 THE COURT: Sure, you can just stick the label
7 on a piece of paper and then staple the paper on to the
8 exhibit.

9 (The Clerk then did as requested.)

10 THE CLERK: Card marked as Government's exhibit
11 12 for identification.

12 BY MR. SOROKA:

13 Q Agent Sharkey, I would ask you to examine those
14 two pieces of paper that you have with you and I am going to
15 ask you if you recognize those items, sir?

16 A Yes, I do.

17 Q And what do you recognize them to be?

18 A They are two small pieces of paper or cards
19 that we seized from the wallet of Dennis Bennett on the evening
20 of the 26th of March, 1977.

21 Q And that is as to each of those two items?

22 A That is correct.

23 Q And what did you do with those items after you
24 seized them?

25 A I initialled them and dated them and took custody

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2 of them and put them in evidence envelope and eventually put
3 them into custody or non-drug evidence in 57th Street.

4 Q Are those two items, exhibits 11 and 12 for
5 identification, in precisely the same condition now as they were
6 on the date you received them from Dennis Bennett?

7 A Yes, sir, they are.

8 MR. SOROKA: I would like to show them to counsel
9 and I would offer Government's exhibits 11 and 12
10 into evidence.

11 THE COURT: Any objection.

12 MR. TERMINI: None, your Honor.

13 THE COURT: Let them be marked.

14 THE CLERK: Government's exhibits 11 and 12
15 now received into evidence.

16 BY MR. SOROKA:

17 Q Agent Sharkey, I would ask you to look at
18 Government's exhibits 11 and 12 in evidence and could you
19 describe what is written on them in ink, if anything, first
20 on Government's exhibit number 11?

21 A Yes, sir, in ink on Government's exhibit 11,
22 blue ink, is the name Francisco Estrada, and on the other side
23 of it is an address, 6524 Lomar Vista Place, Apartment A,
24 Bell, California, with a phone number as follows: 539-8079.

25 That is on number 11.

1
2 Q Now, other than those numbers there, is there
3 an area code for that particular number?

4 A No, sir.

5 Q All right.

6 I would like for you to look at Government's exhibit
7 12 in evidence.

8 Can you please tell us what is written, if anything,
9 on that card in ink?

10 A On the other side of the printed part is the name
11 Frank Estrada with number 589-8079, and underneath that the
12 numbers 1128W7, and above the name Frank Estrada is another
13 name, Jorge-, and a few more numbers.

14 (continued next page)
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Sharkey-direct

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thinking about summations tomorrow.

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MR. SOROKA: There is one other ruling I would

request of the Court and it would be the intention

of the Government before it rests to profer to the

Court a certified copy of a judgement of conviction

for Mr. Bennett in the year of 1974. I have a copy

of it here with respect to the fact that should he

raise the allegation that he was just an unwitting

dupe, I believe that this is entirely relevant, this

copy of a conviction which occurred in Southern Dis-

trict, a Federal narcotics violation, that there was

no mistake on his part --

THE COURT: What role did he play?

MR. SOROKA: In that particular instance, it is

my information that he was an actual seller of nar-

cotics.

THE COURT: Where is the judgement of convic-

tion?

MR. SOROKA: Here it is, your Honor.

THE COURT: What would you say about this,

Mr. Termini:?

MR. TERMINI: Well, I would say number one, an

entrapment has already been raised without my doing

anything --

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Sharkey-direct

THE COURT: Entrapment, you mean because they had a controlled delivery?

MR. TERMINI: It was more than a controlled delivery from what I have listened to so far. We have a situation where the Government informant is in fact a supplier, he arranges the meeting, it's at his hotel room, he gives them the substance, as soon as the man goes out with the controlled substance, he is arrested. I think this goes far beyond even what has been decided by the courts.

THE COURT: We can leave that aside for the moment. I will hear argument later on. that as to whether you are entitled to a charge of entrapment, but the question here is the proof of a similar crime to show the intent to possess this for the purpose of distributing it and not for his own use as he told the arresting agent, and proving that by a certified copy of the prior conviction for a similar offense. I will find the section for you in a moment. I think it's 404 (b). Evidence of other crimes, wrongs or acts, and I will leave out the impertinent part, may be admissible as proof of intent, plan, knowledge or absence of mistake or accident. It is his position that by what happened that he did not intend to buy

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Sharkey-direct

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this or possess it for the purpose of distribution,
3 that just for his own use why can't the prior conviction
4 be admitted to show that he in fact took this sample
5 for the purpose of using it to purchase this?

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MR. TERMINI: What I would just state, I know
the section fairly well. I have read it, analyzed
it and I know the application is for a defendant.
However, I think in a case like this, with one person
who is actually there in the room and could describe
in far greater detail than is on the tape, what trans-
pired is not present. I think if your Honor permits
that to be into evidence is in fact trying the Gov-
ernment's case in the absense of witnesses.

THE COURT: No, that's something else. That's
another argument. I want to know whether a certified
copy of a prior conviction may be admitted to prove
intent, intent to possess the heroin with intent
to distribut it. I have had occasion to rule on this
before. The question is really whether you can show
a prior similar act and whether you can do it by
offering a prior conviction --

MR. TERMINI: My colleague had that problem
and I remember discussing it with him, and we couldn't
reach a conclusion as a safe matter of fact whether

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2 it can be done. I think it's your opinion whether
3 judgement can be done for the purposes of the Govern-
4 ment --

5 THE COURT: There is no question in my mind that
6 I admitted it in that case, but it was never reviewed
7 on appeal because there was a non-guilty verdict. I
8 think there is a more serious question here. I don't
9 know whether he possessed it.

10 MR. SOROKA: With respect to that particular
11 -- that particular thought, the allegation is aiding
12 and abetting theory. The Government's position is this,
13 that the conspiracy was commenced not later than the
14 January meeting, that these narcotics were intended
15 solely for Bennett and it is, I would hope, appropriate
16 for me in this offer of proof, now it is not before
17 the jury, but it is being done in good faith, this
18 Court is aware that Mr. Ponce, who has been named
19 here as a co-actor, was indicted in this district.
20 It was every intention of the Government of taking
21 the proper precautions to have him here and testify
22 the same way Miss Carolyn Usher did, and we would
23 have dealt with Mr. Ponce's indictment at a future
24 date. There is no question in our mind that were it
25 not for his absence, we could prove several prior

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similar acts and I believe Mr. Termini knows it.

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What our theory is that they met essentially on one

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occasion, that Mr. Bennett made a false exculpatory

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statement. He knew those narcotics were intended for

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him and him only.

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MR. TERMINI: That's a question of fact.

7

THE COURT: Do you see what I wrote already

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for the charge, exculpatory statement later proved

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false. That's separate and apart from this problem.

10

Now, let's see how far I can go on aiding and abetting.

11

You say that Estrada-Ponce brought this into the

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motel room solely for Bennett's sale.

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(Continued on next page.)

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/flp.

1- MR. SOROKA: Judge, I would say that when
2 Mr. Ponce left California, it was intended for Mr.
3 Bennett.

4 THE COURT: Of course you have evidence outside of
5 the record.

6 MR. SOROKA: That is only by inference with
7 respect to the meetings, sir.

8 THE COURT: I suspect that is what happened,
9 that you don't take a plane from California and go peddling
10 it when you first get here, and from the conversation
11 on the telephone there is some suggestion that they
12 knew each other, and from the card that was found on
13 his person at the time of the arrest we know that he
14 had his phone number in California, so they knew each
15 other.

16 Now, I think there is enough to show that there
17 was the deal and that this was for Bennett, but you
18 said that you are positive that it was solely for
19 Bennett and that is what interests me.

20 MR. SOROKA: Unfortunately, that will not be
21 before the jury.

22 THE COURT: This is probably a conditional sale,
23 that is if he liked it. It could have been for him if
24 he liked it and that is why he took the sample.
25 You don't buy a kilo and a half of heroin, at least

1 from what I hear here, dealers wouldn't do it without
2 some kind of sample test.

3 MR. SOROKA: May I offer this -- Judge --

4 THE COURT: What will you offer in the record to
5 show that?

6 MR. SOROKA: I don't have to show actual physical
7 possession, I believe that I can show he is guilty of
8 the crimes charged in the indictment if he attempted to
9 possess it,

10 THE COURT: What do you mean if he attempted to
11 possess it, he either had it or he did not.

12 MR. SOROKA: He intended to possess all the
13 entire amount that he had on him 1.85 grams.

14 THE COURT: Well, it could be aiding and abetting,
15 he is probably encouraging the possession and that is
16 aiding and abetting.

17 MR. SOROKA: Yes, sir.

18 THE COURT: In other words, if Estrada Ponce
19 possessed it, because he understood that he was one of
20 the customers, and the indication then is that he took
21 the sample, it might very well come under aiding and
22 abetting.

23 MR. SOROKA: Also, your Honor, I believe if
24 we are able to get the audibility problem resolved,
25 there are certain facts which we believe will show this.

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3 1 THE COURT: We have the transcript, let us
2 assume the transcript can be heard on the tape.

3 MR. SOROKA: For instance, your Honor, for
4 instance price is first mentioned by Mr. Bennett, not
5 Mr. Ponce and the very last thing said --

6 THE COURT: Doesn't that indicate that he hadn't
7 yet bought it, that they were negotiating for the
8 price?

9 MR. SOROKA: It seems to me that the price was
10 decided well before Mr. Bennett ever walked into that
11 room.

12 There is also questioning by Mr. Bennett, is it
13 pure, pure stuff, and he wants--Mr. Bennett wants to
14 check it out and get it out to his people, that he is
15 going to take some and test the sample.

16 THE COURT: I think that shows encouragement,
17 he wants to know how many times it can be cut.

18 He says on page three, "This I am going to
19 give this for sample, I am going to let them check it
20 out."

21 So apparently Bennett already had a purchaser.
22 I think that is a fair interpretation.

23 And then he said, "Then try and sell it like
24 it is," in other words without cutting it, just turn
25 it over.

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4 1 I think that that would be the theory, and that
2 is aiding and abetting in the sense that he encouraged
3 and advised and counselled Mr. Estrada Ponce, but I
4 don't think this is a case of constructive possession at
5 all. It is Estrada Ponce's position that we are
6 talking about with intent to distribute, and at least
7 the theory of Government would be that it was Bennett's
8 encouragement and counselling and advice that aided *
9 and abetted Estrada Ponce to possess it with intent
10 to sell it to Bennett. I don't think at any time,
11 and it may not be until he had the cash or until the
12 terms of sale were completed that you could say that
13 this was in Bennett's possession, and certainly not
14 constructive possession except for the small part,
15 but not for the kilo and a half.

16 How much was the sample, how much did it weigh?

17 MR. SOROKA: 1.85 grams, I believe.

18 THE COURT: I don't think you can even make out
19 that is possession with intent to sell, because he
20 said it was a sample and the sample was probably
21 intended for sampling by Bennett's customer.

22 MR. SOROKA: I am not exactly sure what that
23 intent might have been, but there will be proof from
24 the laboratory report which will show the particular
25 quantity of purity, how pure the stuff was that he took

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5 1 out of the room and whether it was of such a nature
2 that no one could use it without it being cut.

3 THE COURT: I got that from the examination on
4 Mr. Sharkey.

5 All right.

6 I think your number one problem is getting the
7 equipment that can make that tape intelligible to the
8 jury.

9 MR. SOROKA: Might I inquire what the Court's
10 calendar will be early tomorrow so that we can have
11 a technician test the acoustics?

12 THE COURT: Even if I have something on, you
13 can start working on it, you can get here at 9 o'clock
14 if you want to and start.

15 MR. SOROKA: Thank you, sir.

16 Your Honor, can I also have this certified copy
17 marked for identification?

18 THE COURT: I am going to allow it in in light of
19 the position taken by the defendant.

20 MR. TERMINI: I haven't asked a question yet,
21 Judge.

22 THE COURT: What?

23 MR. TERMINI: I haven't asked a question as yet,
24 Judge, that made any --

25 THE COURT: That is not your position, the position

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1 additionally premarked?

2 THE COURT: All right, mark them.

3 Have you listened through the earphones?

4 MR. TERMINI: No, your Honor.

5 MR. SOROKA: I have, Judge.

6 THE COURT: Why don't you test it and see
7 whether you agree that it is better?

8 I would like to try it, too.

9 MR. SOROKA: These earphones are operated
10 by turning the switch on one of the earphones.

11 MR. TERMINI: I would have one request, when
12 this tape is introduced that the tape then be given
13 to be played to the jurors first without the aid
14 of the transcript, and the reason why I say that,
15 your Honor, is that I noticed yesterday when the
16 tape is being played the jurors immediately upon
17 discovering they could not hear what was going on
18 immediately started reading the entire transcript,
19 ten of the twelve jurors read the transcript before
20 I would say forty seconds of the tape was even played.

21 THE COURT: You can't claim prejudice because
22 you agreed it was an accurate transcription. If you
23 had challenged it --

24 MR. TERMINI: It says that words are
25 inaudible on it.

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1 THE COURT: Let me say the reason for playing
2 the tape is because they may hear things that the
3 transcriber did not hear, and that happens very
4 often. Sometimes it has to be played two or three
5 times.

6 For myself, I can tell you I don't care how
7 accurate the recording is and how good it is, I
8 cannot follow it easily without a transcript, and I
9 don't think that means that they disregard the tape,
10 I just think it means that it is easier listening.

11 MR. TERMINI: All I would ask, your Honor,
12 is that we first hear it without the aid of a
13 transcript. I don't think it inconveniences the
14 Court for five minutes.

15 MR. SOROKA: I have no objection to that,
16 Judge, as a matter of fact --

17 THE COURT: We will do it that way.

18 MR. SOROKA: (Continuing) I believe the
19 transcript, though accurate, might be inaccurate
20 as to the actual person who spoke.

21 I listened to this with headphones and it is
22 substantially better than what you even heard when
23 you determined the audibility.

24 THE COURT: Oh, sure, I would hope so because
25 I just heard a few sentences.

1 MR. SOROKA: I am content that this tape
2 will be better as a result of the headphones.

3 THE COURT: All right.

4 Let Mr. Termini listen to it.

5 AGENT SHARKEY: It also has volume control,
6 your Honor.

7 THE COURT: I know, you have to turn the
8 switch on.

9 Incidentally, this switch is on.

10 MR. SOROKA: They should run, we tested them
11 and we have extra batteries.

12 THE COURT: Let us just try it to see what
13 we hear.

14 (At this point the cassette was played through
15 the earphones.)

16 THE COURT: That is better over what we heard
17 over the loudspeaker.

18 THE CLERK: Your Honor, Jurors Nine and Ten
19 are still missing. I will call down to the Central
20 Juryroom to see if they have come in.

21 (At 10:10 A.M. the Clerk called the Central
22 Juryroom.)

23 MR. TERMINI: Your Honor, in the seat next to
24 me is a law assistant whom Legal Aid has hired.

25 THE COURT: That is all right.

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1 First we are going to listen to the tape
2 without the transcript. You do your best to try to
3 understand what is on the tape. It is only a ten
4 minute tape.

5 Then you will be given the transcript and
6 be allowed to follow the transcript and listen to
7 the tape.

8 Put your headsets on..

9 Now, if any headset doesn't work right, raise
10 your hand. They are on batteries and sometimes the
11 battery runs down.

12 I don't want any instruction by the agent, I
13 will give the instructions.

14 Put it on now and put it on full volume, turn
15 it all the way over and if it doesn't work raise
16 your hand.

17 All right, let us have it.

18 (At this point Mr. Thomas Sharkey played the
19 cassette.)

20 (Continued on next page.)
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1C and 1D, and that on or about April 25, 1977, Robert A. Henderson conducted a laboratory analysis on Government Exhibits 5 in evidence: and on or about June 27, 1977, Robert A. Henderson conducted a laboratory analysis on Government's Exhibit 7 in evidence; and that on or about June 8, 1977 Robert A. Henderson conducted a laboratory analysis on Government's Exhibits 3, 4 and 6 in evidence and if called to testify Robert A. Henderson would testify that as a result of his analysis of the chemical composition of the following Government exhibits are as follows:

Exhibit 1: 325.53 grams of heroin, procaine and lactose with a strength of 28 percent to 46 percent; and 184.00 grams of procaine hydrochloride.

Exhibit 2: 1.45 grams of heroin, procaine and lactose with a strength of 47 percent.

Exhibit 3: 254.98 grams of procaine hydrochloride.

Exhibit 4: 795.55 grams of procaine hydrochloride.

Exhibit 5: 424.97 grams of heroin, procaine, lactose and mannitol with a strength of 12 percent to 26 percent.

Exhibit 6: 173.30 grams of heroin hydrochloride

2 Q Let's start with brown rock heroin?

3 A A kilo?

4 Q One kilo.

5 A Well, it will vary but --

6 Q A rough estimate in your parameters.

7 A The bottom line would be about thirty five
8 thousand dollars and it could go anywhere to about fifty
9 to fifty four thousand per kilo.

10 THE COURT: And a kilo is how many pounds?

11 THE WITNESS: 2.2, your Honor.

12 THE COURT: And a kilo gram is a thousand
13 grams, isn't that true?

14 THE WITNESS: That is true.

15 THE COURT: A kilo means a thousand grams.

16 THE WITNESS: Grams, yes.

17 BY MR. TERMINI:

18 Q What would white heroin go for?

19 A White, white Asian heroin would go a little
20 higher since it has been proved that the purity is somewhat
21 better than brown.

22 Q What would be the price of a kilo of
23 marijuana?

24 A A kilo of marijuana?

25 Q Yes.

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Q How do you weigh heroin?

A By the scale.

Q Is there such a process called spooning?

A Spooning is a street term for a weight.

Q It is not the preponderant mode of weighing
heroin?

A No, sir.

Q What is "Chiva"?

A "Chiva," tht is heroin, sir.

Q What is your source of information as to
that?

A I have known it since I have been practically
on the job, it is just a jargonism for heroin, it is like
the Italians use the word, "Barbano."

Q Is it also considered a Spanish form for
very pure marijuana?

A No, sir, it is not.

Q For Indian hashish?

A No, sir, it is not.

Q Do you know your source for the word,
"Chiva," is there any manual?

A Manuals, I have seen it in our periodicals,
I have seen it in our drug abuse brochures, I have seen
it in drug pamphlets that are handed out to school age

Sharkey-redirect

Q Did you promise him that he wouldn't be separately indicted for what he did at the airport?

A No.

Q Did you promise him even if he were convicted for what he did at the airport, he would get some sort of a deal on time?

A No.

Q Did you promise him that he wouldn't be indicted separately?

A No.

Q Tell this jury everything that you promised Ponce with respect to him cooperating.

A I told Frank Ponce that everything he told me or assisted me with in the investigation would be made, told to the Assistant U.S. prosecuting attorney as well as to the probation office and as well as to the Judge.

Q The amount of actual heroin that was seized from Francisco and Anna, was it more or less than 1000 grams?

A It was a little bit more.

Q And the -- excuse me for a moment.

MR. SOROKA: Judge, I would ask to approach the side bar for a moment with respect to one more proffer of evidence.

THE COURT: The jury may be excused.

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Sharkey-redirect

MR. SOROKA: Can you mark this as exhibit 29?

THE COURT: Take that other part off too.

MR. SOROKA: That's the certification, your Honor.

THE COURT: All right. I will allow the certification.

MR. SOROKA: We have deleted that part of the 3 pages with the papers that says the bail was set and that a trial was held.

THE COURT: All right.

THE CLERK: Government's Exhibit 28 now received into evidence. Magazine marked Government's Exhibit 29 for identification.

(So marked.)

THE COURT: All right. Seat the jury.

Incidentally, bail was forfeited not only on Francisco, but also with his brother. I think that fact should be recited too. What was his brother's name?

THE WITNESS: Jose Merced.

(The jury entered the courtroom at 11:50 a.m.)

THE COURT: With the consent of the defendant, I take judicial notice that Francisco Estrada-Ponce was scheduled to appear in court and failed to appear,

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Sharkey-redirect

12 1
2 and I forfeited bail, and he absconded. I should say
3 it the other way, he absconded and I forfeited bail.
4 The same is true as to his brother, Jose Merced. I
5 admitted into evidence a judgement and commitment
6 against the defendant Dennis Bennett. May I have it,
7 please? And only that portion of it which says that
8 the defendant Dennis Bennett was convicted of the
9 offense, and I am quoting, "of unlawfully, wilfully
10 and knowingly distributing and possessing, with the
11 intent to distribut, a schedule 1 narcotic drug
12 controlled substance, to wit, approximately 12.64
13 grams and 29.23 grams of heroin, in violation of
14 Title 21, U.S. Code, Section S812, 841(a) 1 and 814(b)
15 and I excise from the exhibit that paragraph begin-
16 ning, "Adjudged."

17 Now, the defendant is required to answer only
18 the charge in the indictment, not any other charge.
19 The defendant prepares his case, ready to meet that
20 charge and he is not required to meet any other charge
21 Why, then, did I permit proof to come before this
22 jury showing that this defendant on February 6, 1974
23 was convicted of a violation of what we call the
24 Drug Abuse Control Act of 1970, which is Section
25 812 of Title 21, and you will know more about that

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2 card that you testified to on direct, the hotel registration
3 card, you were using all the exemplars together; is that
4 correct?

5 A I did, yes.

6 MR. TERMINI: Okay.

7 I have no further questions.

8 THE COURT: Does the Government have any
9 redirect?

10 MR. SOROKA: No, Judge.

11 THE COURT: You may step down.

12 THE WITNESS: Thank you, sir.

13 THE COURT: Thank you.

14 (The Witness was excused.)

15 THE COURT: Is that the Government's case?

16 MR. SOROKA: Yes, it is, your Honor.

17 THE COURT: The jury is excused for lunch.
18 I will ask you to return at 2 o'clock.

19 (At 1:05 p.m. the jury left the courtroom.)

20 THE COURT: Are there any motions, Mr. Termini?

21 MR. TERMINI: Yes, your Honor.

22 First with respect to Count Two of the
23 indictment, your Honor, I don't believe that there
24 has been jurisdiction shown with respect to the
25 substantive count.

1 THE COURT: Jurisdiction?

2 MR. TERMINI: Yes, your Honor.

3 THE COURT: Well, on the aiding and abetting
4 count?

5 MR. TERMINI: Yes.

6 What we have in this case is a second count
7 which is purely a possessory count and the possession
8 if at all in this case, was purely in the Borough
9 of Manhattan, which is in the district, the Southern
10 District of New York.

11 THE COURT: Yes.

12 MR. TERMINI: There is no element of my
13 client being involved elsewhere.

14 THE COURT: So you are talking about venue.

15 MR. TERMINI: If that is the proper word,
16 I'm sorry, I misuse them interchangeably, I am
17 in error.

18 I feel that the theory of this case is as to
19 this particular count that the possession had to
20 start at the time of the entry into the apartment
21 in Manhattan.

22 THE COURT: If we have the aiding and abetting
23 as the offense, then the possession was with
24 Francisco Estrada Ponce, and if this Defendant
25 aided and abetted by inducing Estrada Ponce to

000108

1 possess it in this district, then he may be charged
2 in either district, either in the district in which
3 he aided and abetted or in the district in which
4 the crime was committed.

5 MR. TERMINI: I fail to see how that covers
6 Count Two.

7 THE COURT: I am talking about Count Two.

8 MR. TERMINI: Yes, sir.

9 THE COURT: For example, if it is found that
10 Estrada Ponce possessed in this district with
11 intent to distribute and the crime was committed
12 in this district, then the Government can prosecute
13 in the district in which the aiding and abetting
14 took place or in the district in which the crime
15 was committed.

16 There is enough authority on that.

17 MR. TERMINI: All right.

18 THE COURT: On that basis the motion is denied.

19 MR. TERMINI: I move to dismiss both counts
20 of this indictment, your Honor, on the theory of
21 entrapment as a matter of law.

22 THE COURT: The motion is denied.

23 I do intend charging on entrapment.

24 I am not certain, frankly, in my mind whether
25 the fact question is presented, let alone whether

1 it is a question of law, but it is close enough and
2 I think the jury should have it.

3 Do intend to put in a case or do you intend
4 to rest?

5 MR. TERMINI: I intend to rest.

6 THE COURT: When the jury comes in, then,
7 you will rest before the jury, I will excuse the
8 jury and you will renew your motions, then I expect
9 the Government to sum up.

10 How long do you think you will take for
11 your initial summation?

12 MR. SOROKA: No more than half an hour,
13 Judge.

14 THE COURT: And you?

15 MR. TERMINI: Within that range, forth
16 minutes, I would say.

17 THE COURT: Well in all probability I will
18 charge.

19 I haven't received any requests to charge.

20 MR. TERMINI: Well, they are in my office
21 being typed.

22 I will state that I had three requests,
23 number two I will withdraw before I would even
24 submit it because of what I had done earlier this
25 morning.

1 Now number one is with respect to entrapment,
2 and I think it probably would be contained within
3 what your Honor would charge.

4 THE COURT: Yes.

5 MR. TERMINI: I'm trying to remember what
6 number three was.

7 Three was with respect to conspiracy member-
8 ship, membership in a conspiracy, which might in
9 fact also be well covered in your charge.

10 THE COURT: I intend to charge on that.

11 MR. TERMINI: There is one more point which
12 I was going to add, and I didn't know this morning
13 if I would add something, and that is to the effect
14 that if the jury were to find that Mr. Bennett
15 thought he was in fact dealing in marijuana then
16 he must be acquitted of the charges.

17 THE COURT: That is clear, I told them that
18 when I gave them the limiting instruction, I intend
19 to say the same thing.

20 MR. TERMINI: Under those circumstances, your
21 Honor, I don't think I have anything more to give
22 your Honor.

23 THE COURT: Before they can find him guilty
24 of joining into a conspiracy or possession or aiding
25 and abetting the possession, the Government must

000111

1 prove beyond a reasonable doubt that he was aware
2 that he was dealing in heroin and that the
3 participation was a deliberate and intentional
4 participation in a conspiracy to deal in heroin,
5 and if all the Government proves is that he was
6 dealing in marijuana, then of course they have
7 failed to prove their case.

8 MR. TERMINI: I think that covers about what
9 I had intended to do.

10 THE COURT: I may have even given a stronger
11 charge than what you would have offered.

12 MR. TERMINI: Excuse me?

13 THE COURT: I said I may even have given a
14 stronger charge than you may have offered.

15 Do you have any requests to charge?

16 MR. SOROKA: Yes, sir.

17 You directed that we have them by 11 o'clock,
18 this is the first break, I do have them here.

19 THE COURT: May I see them?

20 MR. SOROKA: Yes, of course.

21 THE COURT: Maybe I can rule on them right
22 now.

23 MR. SOROKA: I was anticipating potentially
24 you charging on entrapment, for whatever it is worth
25 and I would like to take exception to that.

1 I don't think the Defendant has successfully
2 raised that even through the cross examination of
3 any of these agents. He certainly has not confronted
4 the issue with respect to predisposition.

5 THE COURT: I must confess it is close, but
6 let us assume that Estrada Ponce was lying and that
7 it was never intended for this fellow, and that is
8 a big assumption, I know --

9 MR. SOROKA: Right.

10 THE COURT: (Continuing) And he decided that
11 he would call Bennett and kept calling, and mind
12 you, the girlfriend Carolyn didn't put him on the
13 telephone, but he insisted on calling and that might
14 present a question.

15 If I were forced to make a decision one way
16 or the other, I think I would agree with what you
17 are saying, that I think the safer course is to
18 give it to the jury.

19 Suppose you do this in the lunch hour, you
20 go over the request to charge and just point out
21 both that you have exceptions too.

22 As a matter of fact you do charge on
23 entrapment and isn't that strange that you did.

24 MR. SOROKA: I was anticipating the Defendant
25 putting on evidence which would raise that issue

1 and I was going to withdraw it until you made your
2 statement.

3 THE COURT: What do you think he was going
4 to raise about it, by putting somebody on the
5 stand?

6 MR. SOROKA: Under these facts it is most
7 improbable that he would have raised it in that
8 manner.

9 THE COURT: I don't know how you could expect
10 the Defendant to put somebody on.

11 MR. SOROKA: I didn't know that.

12 THE COURT: Whom would he put on, what would
13 he have put on, he knew that Estrada Ponce was
14 gone.

15 MR. SOROKA: I don't know even if he were
16 available he would put him on.

17 THE COURT: That doesn't matter, but when
18 you say you anticipated he might put evidence in,
19 well, what kind of evidence, where would he get it
20 from, you would have to give it to him.

21 All right, 2 o'clock, and as I say, rest
22 before the jury and I will excuse the jury and then
23 I will go over the request to charge.

24 You can then get ready to sum up, Mr.
25 Soroka.

000114

1 MR. SOROKA: Yes, sir.

2 To save a bit of time with respect to my
3 summation, I will inform both the Court and Counsel
4 that in the course of my summation it will be my
5 intention to play the tape again.

6 I would ask now for a preliminary ruling
7 as to whether or not at that point in time we
8 will be permitted to give the jury Exhibit 25
9 for identification, the transcript at that time.

10 THE COURT: I will allow it. If it were
11 done once I will allow it to be replayed in
12 exactly the same way as it was given originally
13 to the jury.

14 I will allow that to be replayed in the
15 summation.

16 MR. SOROKA: I understand, however when they
17 deliberate they will not be able to have that
18 particular transcript since it is not in evidence
19 although I would have no objection to that.

20 THE COURT: I think that is the safer course.

21 MR. SOROKA: I agree with the Court.

22 THE COURT: I think it could have been marked
23 in evidence on the consent or on the admission of
24 the Defendant that the transcript was accurate,
25 but there is little difference between whether

1 it is marked in evidence or for identification
2 because I will charge the jury that it is not the
3 primary evidence, the primary evidence is the tape
4 and the transcript is an aid, and what difference
5 does it make if you have an aid marked in evidence
6 or an aid marked for identification. But I think
7 the safer course is what you suggest.

8 MR. SOROKA: Thank you, sir.

9 THE COURT: All right, 2 o'clock.

10 (At this point a recess was taken until
11 2 o'clock.)

12 (Continued on next page.)
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000116

1 I am not going to stand here and tell you it's not
2 true, forget it, it never happened, he's faking you
3 out.
4

5 No. It is true. Definitely. It happened.
6 But doesn't that fit more in line with what happened
7 to Mr. Bennett? Mr. Ponce, just might have known
8 about that. Does that give the right to sweep the
9 streets? Think of the facts in this case. Two por-
10 tions up to March 25th, and what happened after
11 March 25th? Conspiracy and possession with intent to
12 distribute. Remember, the burden is on the Government
13 to prove the facts beyond a reasonable doubt. Not
14 conjecture. This case has nothing to do with conjecture.
15 It is facts.

16 I submit to you the facts have not been estab-
17 lished to show Dennis Bennett is guilty beyond a
18 reasonable doubt. I thank you very much.

19 THE COURT: We will take a few moments recess
20 and then we will hear rebuttal summation by Mr. Soroka.

21 (The jury withdrew from the courtroom at 3:10
22 p.m.)

23 (Out of hearing of the jury.)

24 THE COURT: I have a question to ask the U.S.
25 Attorney and a question to ask the defendant.

MR. SOROKA: Yes, your Honor.

THE COURT: You asked the jury to find the defendant guilty of attempt, an 846 crime. I understood it was the Government's position that the defendant was guilty of aiding, abetting, an 841(a)1 crime. Am I correct?

MR. SOROKA: Yes, sir. I believe that 846, however, with respect to the conspiracy should the Court find that it was a legal impossibility, since Mr. Ponce had the drugs and he was a Government agent under the Government's supervision at the time at the hotel, Mr. Bennett could never actually take possession of those drugs, but an attempt to do so under section 846 constitutes the same violation.

THE COURT: O don't doubt it except that if you have read U.S. vs. Jackson, which happened to be my case, I though attempt is just one step beyond conspiracy and the idea that it would have been accomplished, but for , I don't think is the test in the Federal court anymore. And 841 --

MR. SOROKA: Your Honor, I will rely in total on your charge. I don't think that the -- the theory is going to be the same. I will make sure not to mention it in rebuttal.

1
2 HE COURT: I intend to charge that the Govern-
3 ment does not charge the defendant with possessing
4 with attempt, with intention to distribute. As a
5 matter of fact, if the Government's position was as
6 you suggested, attempt under 846. I might agree with
7 Mr. Termini that we don't have venue.

8 MR. SOROKA: No, the theory is certainly aid-
9 ing and abetting charge in the indictment.

10 THE COURT: The question I have to ask you is
11 whether you want me to charge on the failure of the
12 defendant to take the witness stand, that they couldn't
13 --

14 MR. TERMINI: I am sorry for not --

15 THE COURT: Would you rather I charge it or
16 would you rather I say nothing?

17 MR. TERMINI: I would rather that you charge
18 it.

19 MR. SOROKA: I have one additional request to
20 charge and I bring it up now since it was raised in
21 Mr. Termini's summation, and that is, in essence, with
22 respect to rule 607 of the federal rules of evidence,
23 in that the U.S. Attorney, or either attorney, should
24 not be bound and does not vouch for the credibility of
25 any witness, with respect to Carolyn Usher --

to distribute quantities of heroin hydrochloride and cocaine, Schedule I and II, Narcotic Drug Controlled Substances, in violation of Title 21, United States Code, Section 841(a)(1), and in violation of Title 11, United States Code, Section 846."

So Count 1 charges a conspiracy to violate Section 841(a)(1), to wit, a conspiracy to possess with intent to distribute heroin, to go into the business of dealing in heroin.

Count 2, on the other hand, is what we call the substantive crime.

The Government charges that the defendant possessed with intent to distribute or aided and abetted the crime of possession with intent to distribute, and this is the language:

"Count 2:

"On or about March 26, 1977, within the Eastern District of New York and elsewhere, the defendant, Dennis Bennett, and Francisco Estrada-Pence, named herein as a co-actor, but not as a defendant, did knowingly and intentionally possess with intent to distribute a quantity of heroin hydrochloride, a Schedule I Narcotic